No. 14770

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS, INC., A CORPORATION, PETER A. BANCROFT AND VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, APPELLEES

AND

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C. FINN, AND INTERNATIONAL AIRPORTS, INC., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

WARREN E. BURGER,
Assistant Attorney General,
LAUGHLIN E. WATERS,
United States Attorney,
LOUIS LEE ABBOTT,
Assistant United States Attorney,
MELVIN RICHTER,
RICHARD M. MARKUS,
Attorneys,
Department of Justice.

INDEX

CITATIONS

Cases:

Cases—Continued

In the United States Court of Appeals for the Ninth Circuit

No. 14770

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS, INC., A CORPORATION, PETER A. BANCROFT AND VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, APPELLEES

AND

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C. FINN, AND INTERNATIONAL AIRPORTS, INC., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

JURISDICTIONAL STATEMENT

The United States transferred a war surplus airplane to defendant Vineland School District upon application by its superintendent, defendant Peter A. Bancroft, pursuant to a postwar educational disposal program. Vineland later entered into a contract to sell and thereafter transferred possession of the plane to defendants George C. Finn and Charles C. Finn, who (a) mortgaged it to defendant International Airports, (b)

authorized International to make certain repairs, and (c) executed a lease of the plane to International. The Government brought this action against Vineland, Bancroft, the Finns, and International, contending that the terms of the transfer to Vineland imposed restrictions on Vineland's right to use or sell the plane, that these restrictions were violated by Vineland's transactions with the Finns, and that as a result of these violations the Government was entitled to retake possession of the plane and to recover damages. In addition to the answers of all defendants, the Finns filed a counterclaim seeking an affirmative judgment against the Government, claiming that the Government had deprived them of their right to use the plane when it sequestered the plane at the commencement of the action by invoking, as authorized by Rule 64 of the Federal Rules of Civil Procedure, the California claim and delivery procedure (Cal. Code Civ. Proc., secs. 509–21, *infra*, pp. 97–99).

Rejecting the Government's contention, as well as Vineland's argument that there had been no valid sale to the Finns, the District Court adjudged that the Finns had title to the plane subject only to certain claims by International (R. 156–157, 160–161).[1] The court below also ordered, on the basis of the Finns' counterclaim, that the Government return the plane to the Finns in the same condition as it was when originally sequestered, ordinary wear and tear excepted, or pay the Finns its monetary equivalent (found to be $50,000), and that it pay the Finns $15 per day for each day from the date of the seizure that they are denied possession thereof (R. 160–161). An order denying a timely motion for new trial, or to amend the findings and the judgment (R. 162–173), was filed on March 31, 1955 (R. 179). The United States filed its notice of appeal from the judgment on April 13, 1955 (R. 180–181), and Vineland filed a notice of appeal on May 27, 1955 (R. 994–995).

---

[1] References to the printed record are designated (R. —). Many of the exhibits relevant to this appeal were not reprinted, but a motion was filed requesting the court to consider those exhibits in their original form (R. 1007–1010). References to those exhibits are designated by the original exhibit number. A complete list of those exhibits with a brief description of each is set forth in Appendix A, *infra*, pp. 75–80.

The Government's action invoked the district court's jurisdiction under 28 U. S. C. 1345; the counterclaim set forth no statutory ground for jurisdiction of the court below (R. 101–106) and the existence of such jurisdiction is contested *infra,* pp. 56–66. This Court's jurisdiction rests on 28 U. S. C. 1291.

STATEMENT OF THE CASE

1. *The Government's transfer to Vineland.* Early in 1946, the Office of Aircraft Disposal of the War Assets Administration notified a large number of educational institutions, including Vineland, that surplus aircraft were available to them under a special educational disposal program. Vineland was interested in acquiring such planes, so its superintendent engaged in extensive correspondence with various Government officials (R. 222–227). One circular received by Vineland (Vineland's Exhibit E) advised that certain aeronautical property would be distributed "to eligible educational institutions at nominal prices for ground instruction, research, and experimentation" and instructed interested schools to apply by submitting two completed copies "of the enclosed WAA Form 65" which would "suffice for all future transactions under the provisions of this plan." On June 25, 1946, Vineland's superintendent, Peter Bancroft, executed War Assets Administration Forms 65 and 66 (entitled "Purchase Order") in order to obtain such surplus aeronautical property (R. 14–18; Vineland's Exhibit D).

The WAA Form 65 Agreement repeated the instruction that it "shall be effective for all future transfers of Aeronautical Property under the provisions of Surplus Property Administration Regulation No. 4, as amended from time to time" (see par. 8, R. 16). In the Agreement, Vineland certified that it is an "educational institution" within the meaning given by the Surplus Property Act (see par. 1, R. 14), that the property to be acquired is for the sole use of a tax-supported or nonprofit institution for nonflight instructional purposes (see par. 2, R. 15), and "[t]hat the acquired property will not be used for any actual flight purposes" (see par. 6, R. 15). In addition, Vineland agreed "[t]hat all property when unfit for the above purpose will be sold only as scrap and then only after it shall have

been rendered completely unfit and useless except for its basic material content" and that "[s]ales consummated within three (3) years of the date of acquisition must have the prior approval of the Disposal Agency" (see par. 7, R. 15–16).

In response to Vineland's specification on WAA Form 66 of the type of aircraft which it wished, Vineland was allocated a C–46A Curtiss Commando Airplane. This type of aircraft, a two engine land plane suitable for passenger or freight transportation, had a market price of $5,000 at that time (R. 116, 150) and was being sold by the War Assets Administration for that amount to ordinary purchasers without restrictions on subsequent use or resale (R. 281, 300). However, the plane was delivered to Vineland upon payment of only $200 (Plaintiff's Exhibits 4, 7),[2] the price set for transfers of this type of aircraft to educational institutions (Vineland's Exhibit E), pursuant to section 13 (a) (1) (C) of the Surplus Property Act of 1944 (58 Stat. 765):

> In fixing the sale or lease value of property to be disposed of under subparagraph (A) [*i. e.* educational disposal]. * * * the Board shall take into consideration any benefit which has accrued or may accrue to the United States from the use of such property by any State, political subdivision, instrumentality, or institution.

Vineland's payment was forwarded to the War Assets Administration by Peter Bancroft, as Vineland's agent, and on July 10, 1946, receipt was acknowledged on a WAA Sales Receipt form (Document 1 of International's Exhibit A).

When Vineland picked up the plane on July 25, 1946, its representatives, the WAA representative and the local storage contractor executed WAA Form SWPD–DP 1316 (entitled "Release of Custody of Aircraft") (R. 125). The Form 1316 (Plaintiff's Exhibit 4) was intended primarily to evidence the release of all claims on the plane which might be made by the

---

[2] The total amount paid was $300 (R. 126, 226), but $100 thereof was allocable to a smaller plane which was transferred at the same time (Plaintiff's Exhibit 7; Sales Receipt—Document 1 of International's Exhibit A) and which is not involved in this action.

storage contractor. However, the nature of the transfer is also indicated by the large stamp "EDUCATIONAL DISPOSAL" and by the typewritten legend "[t]his aircraft was sold for educational use only." Vineland's representative acknowledged "receipt" of the aircraft on that Form 1316. No other document in the nature of a bill of sale or a certificate of title was ever issued to Vineland (R. 125, 228–230).

2. *The period of Vineland's possession.* The plane was flown to the Sunset School strip in Vineland's district where it was used as a classroom and for other educational purposes until it was removed by the Finns on October 23, 1951, pursuant to their contract with Vineland executed on February 28, 1951. During the period that they held the plane, Vineland's officials were reminded of the restrictions imposed on such surplus transfers and the Government's claim of an interest in planes so transferred on at least two separate occasions. On or about March 18, 1948, Vineland received another C–46 for $200, and the document noting the transfer (International's Exhibit U–2) specified that the "[a]ircraft will be disposed of under provisions of SPA REGULATION #4 for nonflight ground instruction purposes only and is not for resale." The memorandum added that in that transfer, as in the transfer here involved, "[n]o certificate of title will be issued."

Later, the Federal Security Agency's Property Utilization Bulletin No. 6 (Plaintiff's Exhibit 15) was sent to interested educational institutions, including Vineland. That bulletin, dated January 10, 1951, described the program under which the armed forces intended to "exercise recapture" of some aircraft previously transferred to schools that had become excess to the needs of the schools holding them. The Government there asserted its right to retake planes which were no longer needed for educational purposes, subject only to the assurance that the schools, from which the planes were recaptured, would be reimbursed for "out of pocket expenses incurred by the institution in the acquisition of the aircraft" (Plaintiff's Exhibit 15).

The fact that Vineland recognized and accepted the limitations on its rights under the transfer is shown by its negotiations with the Finns (see *infra*, pp. 6–8) and by a letter written

by its superintendent to the state agency for surplus property on April 30, 1951. In that letter (Plaintiff's Exhibit 18), Vineland's superintendent assured the state agency that Vineland had no planes which would be subject to recapture since "[n]one of these units are surplus to us due to the fact that we are still using them regularly." He added that Vineland had an AT–6 plane which they wished to exchange, if War Assets regulations would permit such a transaction, and he asked whether there was "any legal way" that a plane received under the surplus property program could be traded for a smaller plane (Plaintiff's Exhibit 18).

3. *Vineland's dealings with the Finns.* Late in 1950, the Finns approached Vineland with various propositions for the purchase of the plane (R. 238–40), and in a letter dated December 5, 1950 (Vineland's Exhibit C), the Finns made a formal offer to buy the plane. Although this offer, like its predecessors, was rejected (R. 248, 514), it engendered considerable discussion among the members of Vineland's board of trustees (R. 250) and lead to the posting of notices calling for bids, as required by the California statutes regarding the sale of public property. The notices (R. 57–58) cautioned that "[b]idders are expressly notified that the aforesaid aircraft was acquired by the district from the Government of the United States and the War Assets Administration, subject to certain restrictions on the use thereof under the deed of conveyance, and the successful bidder will be required to secure the necessary release to said restrictions from the proper governmental agency of the United States of America" (R. 57–58).

The Finns' bid (Finns' Exhibit L), which was the only one submitted (R. 150), provided for payment of $5,000 cash, transfer to Vineland of another C–46 as a replacement for the plane being sold, and the performance of certain work specified in the notice for bids. The Government's interest in the plane and its right to prevent a sale was explicitly recognized in the bid:

> It is the understanding of the undersigned bidders that the performance of the above conditions is contingent upon their securing the necessary releases to any restrictions placed on the said C–46 Aircraft #23645

> by the United States Government, or proper agency thereof.

The effect of possible failure to obtain permission from the Government was also treated in their bid:

> It is the further understanding of the undersigned bidders that they may elect, at their option, to perform the above conditions in full even though proper releases cannot be obtained, provided, however, that adequate assurance is given to the Vineland School District that said C–46 Aircraft #23645 will not be used for flying purposes. In the event such option is exercised by the undersigned the Vineland School District shall be obligated to complete said sale under the terms and conditions specified.

Vineland's board of trustees in due time accepted the Finns' bid (R. 255) and on February 28, 1951, Vineland and the Finns entered into an "Agreement" (R. 59–66). While in Paragraph I of the agreement Vineland undertook concurrently with the execution of the agreement to transfer "all its right, title, and interest" in the plane and to execute "a Bill of Sale and/or transfer of title to the said aircraft * * *" (R. 6),[3] the Finns in Paragraph II agreed that "irregardless of the transfer of possession and title of the said C–46 Aircraft #23645, the sole use of said aircraft shall be and the same is reserved to the District for educational purposes only, until such time as all of the terms and conditions set forth in this agreement are fully performed by * * * [the Finns]," subject further to a right in the Finns to make repairs on the plane on the school premises (R. 60–61).[4]

---

[3] On the same day (February 28, 1951), Vineland's superintendent signed a CAA Form Bill of Sale on Vineland's behalf (Document 2 of International's Exhibit A). The Bill of Sale, however, was not acknowledged before a notary public until April 14, 1951. It should also be noted that the Bill of Sale states that the conveyance was made "as per agreement dated February 28, 1951."

[4] The consideration due from the Finns, which was set forth in Paragraph III (R. 61–62), was substantially the same as that required by the notice for bids and offered by the Finns in their bid of January 19. Because the consideration included property, services, and cash it is not cer-

The Agreement went on in Paragraph IV to recognize the Government's interest in the plane (R. 62):

> It Is Expressly Agreed and Understood, that this agreement is contingent upon * * * [the Finns'] ability to secure the necessary clearances from the Government of the United States of America on restrictions now existing on the use and possession of the afore-described C–46 Aircraft # 23645, by virtue of the Deed of Conveyance of said aircraft from the said Government of the United States to * * * [Vineland], and by virtue of related federal laws on the use thereof.

The Finns were allowed six months "to secure the aforesaid clearance from the Government of the United States of America" (R. 62–63), with an additional six months if at that time they had been unable, but were willing to continue trying, to obtain the requisite clearance (R. 63). Inability to obtain such permission from the Government would excuse most of the Finns' undertakings (R. 63) provided that they promptly reconveyed the original C–46 back to Vineland (R. 64). However, "[i]n the event the * * * [the Finns] are unable to secure the aforesaid Governmental releases within one (1) year from the date of this agreement * * *, then and in that event * * * [the Finns] shall, nevertheless, be entitled to delivery of the aforesaid C–46 Aircraft #23645 for salvage purposes only [5] provided satisfactory assurance is given to * * * [Vineland] that existing Governmental restrictions will not be violated by * * * [the Finns] or by any other person, firm or corporation, with or without the consent of * * * [the Finns]" (R. 64).

4. *The Finns' dealings with the Government.* Thereafter George Finn, acting on behalf of himself and his brother, proceeded to seek governmental approval. During various con-

---

tain what liquidated value could be attached to it. The Finns alleged in their counterclaim that $21,000 was paid for the plane (R. 104), and the evidence indicates that this was a reasonable valuation of the plane at that time (R. 150, 116, 286).

[5] For a discussion of the difference between the use for salvage purposes (mentioned here) and use as scrap for basic material content (as required by WAA Form 65) see *infra*, pp. 54–55.

ferences in Washington, he was advised by representatives of the Federal Security Agency, the agency then authorized to release the terms and conditions imposed on transfers to educational institutions (R. 151), that the restrictions on use and sale of planes transferred to schools were not being released at that time (R. 686, 824). These representatives pointed out that they personally were not authorized to consent to any release of the conditions (R. 687, 693–695) and that it was extremely unlikely that those who were empowered to do so would consent, since the head of the agency had established this policy upon the request of the Department of Defense and the Department of State in order to minimize the possibility of these planes falling into the hands of unfriendly foreign governments (R. 686, 693–694, 716–718, 803, 824, Plaintiff's Exhibit 15). They suggested to George Finn that if he wished to pursue the matter further, he should contact the Administrator of the Federal Security Agency or one of the two other persons authorized to release the restrictions (R. 694, 825). The evidence showed that he did not obtain a release or waiver from any of those three persons (R. 693–697, 828), and the advisory jury as well as the court below so found (R. 116, 151).

5. *Further dealings between Vineland and the Finns.* Although the Finns never received a waiver of the restrictions from the Federal Security Agency, they were able to obtain a certificate of registration of title and a ferrying permit from the Aircraft Records Branch of the Civil Aeronautics Administration (R. 151). On the basis of these CAA documents, the Finns represented to Vineland, on October 23, 1951, that they had obtained permission for the sale from the Government and a waiver of all restrictions on the power to use and sell the plane (R. 265–266). Accordingly, Vineland surrendered the plane to the Finns so that certain repairs could be made off Vineland's premises (R. 113, 266, 527–528), and the Finns promptly flew it to the airport of defendant International. There is no evidence that Vineland's officials made any independent inquiry to determine whether in fact, the requisite government waiver of the restrictions had been obtained, even though the plane was still serviceable for educational purposes at that time (R.

270–271), and even though they knew that the Finns intended to use the plane for commercial flight purposes (R. 151).[6]

6. *The Finns' transactions with International.* Shortly before the plane was taken to International's airport, the Finns and International entered into a comprehensive contract (International's Exhibit E) under which International would make the repairs necessary for the plane to meet CAA requirements for commercial passenger service; International would loan the Finns $15,000, secured by their promissory note for that amount and a chattel mortgage on the plane; and International would lease the plane from the Finns for 18 months after the repairs were completed at $5,000 per month (International's Exhibit C). In the mortgage instrument (R. 35–39), the Finns warranted that they were the absolute owners of the legal and beneficial title to the aircraft and that it was subject to no liens or adverse claims (R. 37). The advisory jury, however, found that International had knowledge or notice of the Government's claim that Vineland's right to use or sell the plane was restricted as well as of Vineland's own claim to the plane (R. 114–115).

The plane was delivered to International on or about October 26, 1951, where it remained until May 25, 1952 (R. 152); during that time International made repairs, the reasonable value of which was $10,200 (R. 152). On May 25, 1952, the Finns retook possession of the plane without International's consent and flew it to Burbank, California (R. 476–479). As a result, on May 28, 1952, International brought suit against the Finns in the Los Angeles Superior Court to recover the plane under California claim and delivery procedure (R. 153; International's Exhibits N and O). On June 9, 1952, International brought a second suit against the Finns in the same court seeking a foreclosure of the chattel mortgage (R. 153; International's Exhibit Q). International obtained possession of the plane from the Sheriff of Los Angeles County on June 13, 1952, when the Finns failed to post a redelivery bond in accordance with the state procedure (R. 153–154). Subsequently, however, the Finns, for a second time, took possession of the plane without

[6] As of the date of the trial, the Finns had not paid any portion of the $5,000 due under their contract with Vineland and had supplied only a part of the labor and materials specified in the agreement (R. 473).

International's permission and prevented International from recovering it (R. 154). International's suits eventuated in a judgment dated February 7, 1953, in which it was ruled that International was entitled to possession of the plane as against the Finns, that the mortgage should be foreclosed, that the Finns were personally liable on their $15,000 note, and that International had a valid claim against the Finns for $10,014.43 with interest as an aircraft lien or as an *in personam* claim (International's Exhibit D).

7. *Pertinent proceedings below.* This action was commenced on July 3, 1952. The Government's complaint, as amended (R. 3–13, 18–27), named as defendants, Vineland, its superintendent Peter A. Bancroft, the Finns and International [7] and sought, *inter alia,* a declaratory judgment that the Government had title to the plane and an immediate right to possession, damages from Vineland for the breach of contract, and damages from the Finns and Peter Bancroft for inducing that breach (R. 12–13, 27–38). Shortly after commencing its original action, and ancillary thereto, the Government amended its original complaint to add a count invoking the claim and delivery procedure of California (Calif. Code Civil Proc., sec. 509–521, *infra,* pp. 97–99), just as International had previously done in the state court (see *supra,* p. 10). Upon receipt of the affidavit of the Assistant United States Attorney representing the Government, the Marshal, as an officer of the court, took possession of the plane on September 18, 1952. The Marshal delivered it to the Government on October 13, 1952, when the Finns failed to execute the redelivery bond required by the California statute as a prerequisite to obtaining repossession of the plane (R. 154). In spite of a court order that the Government's possession of the plane should not be interfered with by any of the defendants pending final judgment in the proceeding (R. 40–42), the Finns seized the plane

[7] Also named as defendant was Seaboard Surety Co., as to whom, the complaint alleged, on information and belief, that the Finns had issued a bill of sale for the plane (R. 8). Seaboard filed a disclaimer of interest and by stipulation, was dismissed from the proceeding without costs (R. 149).

on January 18, 1953, and held it until recovered by the Government on February 1, 1953 (R. 154–155).

Meanwhile, the various defendants filed their answers raising somewhat different defenses to the Government's claim of title and right to possession. Vineland's answer (R. 46–57) asserted that while it had contracted to sell the plane to the Finns, the agreement was conditioned on the Finns' obtaining the necessary waivers from the Government and that the Finns had obtained possession of the plane from Vineland by falsely representing that they had obtained the required waivers; consequently, Vineland claimed that title to the plane continued to reside in it and it had not breached its contract with the Government.

The Finns' answer (R. 67–72, see also R. 101–102) claimed that Vineland had received good title from the Government and had conveyed same to the Finns, and that the Government had consented to the sale to the Finns by the issuance of CAA registration. In addition, the Finns filed a counterclaim against the Government (R. 101–106),[8] seeking a return of the plane and damages for the period during which they were deprived of its use.

Finally, International's answer, as amended (R. 29–34, 107–111), asserted that the chattel mortgage and the statutory aircraft lien gave it a right to the plane superior to that of the other claimants including the Government; in addition to agreeing with the Finns that the Finns had title to the plane by virtue of the Government's transfer to Vineland and the latter's transfer to the Finns, International alleged that it was entitled to the protection of a good faith purchaser who acted without notice of other claims, and that the Government was estopped because International had relied upon representations by the Civil Aeronautics Authority that the Finns had title.

---

[8] This pleading was originally filed as a "Cross-Complaint" (R. 73–84). The District Judge dismissed the cross-complaint on August 30, 1954, as an improper pleading, but gave the Finns leave to file a counterclaim (R. 100) which they did.

Although no party made a timely request for a jury trial,[9] the District Court empanneled an advisory jury. At the close of the trial at which extensive oral testimony was taken and a large number of exhibits were admitted,[10] written interrogatories were submitted by the court to the jury. Each of the responses of the jury (R. 111–117) was accepted by the District Court and incorporated into its Findings of Facts (R. 156). The District Court also entered a Memorandum of Decision (R. 125–144) and Conclusions of Law (R. 156–158).

The District Court ruled that the Government had transferred full ownership, both legal and equitable, in the plane to Vineland without any restrictions or reservations of interest, and that even if WAA Form 65 (R. 14–16, *supra*, p. 3) did undertake to impose restrictions, those restrictions were contrary to the governing regulation (WAA Regulation No. 4, *infra*, pp. 89–96) and the Surplus Property Act of 1944 (*infra*, pp. 81–84) and so invalid. The court went on to hold that Vineland had in turn conveyed its entire interest in the plane to the Finns, and so it concluded that the Finns were now entitled to possession of the plane subject to International's claims against the Finns. The court also held that it had jurisdiction to award an affirmative judgment against the United States on the Finn's counterclaim and ordered the Government to return the plane in the same condition as it was seized, ordinary wear and tear excepted, or its monetary equivalent ($50,000) to the Finns[11] with damages ($15 per day) for the

---

[9] When their untimely request for a jury trial was denied, the Finns protested that they were being denied their constitutional rights, and although they were appearing in *propria persona*, they refused for a while at least to participate in the trial (R. 197 *ff.*).

[10] For the Court's convenience, we have set out in Appendix A, *infra*, pp. 75–80, a list of the exhibits accompanied by a brief description of each.

[11] By supplemental order, the Court directed that if the Government should elect to return the plane, possession thereof should be delivered to International and be held subject to International's claims against the Finns as determined by the Los Angeles Superior Court (see *supra*, p. 11) (R. 175–177).

period during which the Finns were deprived of its use (R. 160–161).[12]

STATUTES AND REGULATION INVOLVED

The relevant provisions of the Surplus Property Act of 1944 (58 Stat. 765), as they read on June 25, 1946 (the date on which Vineland executed WAA Form 65) and subsequent related acts and amendments are set forth in Appendix B, *infra*, pp. 81–89.

The pertinent provisions of California statutes establishing California claim and delivery procedure (Calif. Code Civil Proc., Secs. 509–521, 667) are set forth in pertinent part in Appendix B, *infra*, pp. 97–100.

War Assets Administration Regulation No. 4 is set forth in pertinent part, in Appendix B, *infra*, pp. 89–96.

SPECIFICATION OF ERRORS

The points on which the Government intends to rely on appeal are set forth in their entirety at pp. 1001–1007 of the printed transcript of record. Although the Government does not intend to waive any of these points on appeal, primary stress will be given to the following specification of errors:

1. The District Court erred in ruling that the provisions concerning certain use of aeronautical property contained in Section 8304.11 (b), 32 C. F. R. 1946 Supp., are contrary to the provisions and objectives of the Surplus Property Act of 1944 (58 Stat. 766, 50 U. S. C. App. Sec. 1611) and are invalid.

2. The District Court erred in ruling that the provisions concerning the use and sale of aeronautical property contained in the Form 65 Agreement (Plaintiff's Exhibit 1) are contrary to the provisions and objectives of the Surplus Property Act

---

[12] The damages for loss of use were phrased as $12,300 plus the sum of $15 per day for each and every day such delivery of possession or alternative payment herein provided is delayed after December 31, 1954 (R. 161). However, $12,300 is merely the sum of $15 per day from the date the Marshal seized the plane (September 18, 1952) to December 31, 1954, exclusive of the period (January 18, 1953–February 1, 1953) that the Finns had recaptured the plane.

of 1944 (50 Stat. 766, 50 U. S. C. App. Sec. 1611) and are invalid.

3. The District Court erred in ruling that the provisions concerning the use and sale of aeronautical property contained in the Form 65 Agreement (Plaintiff's Exhibit 1) are contradictory to those contained in Sec. 8304.11 (b), 32 C. F. R. 1946 Supp., and are invalid.

4. The District Court erred in failing to rule that the defendants, and each of them, are estopped to challenge the validity of Sec. 8304.11 (b), 32 C. F. R. 1946 Supp., and of the Form 65 Agreement (Plaintiff's Exhibit 1).

* * * * *

6. The District Court erred in failing to rule that plaintiff had title to and the right to possession of the aircraft in suit at all times from February 28, 1951, to the date of Judgment, and in failing to rule that no defendant had the power to make any transfer or hypothecation of said aircraft.

* * * * *

8. The District Court erred in ruling that the War Assets Administration transferred to the defendant Vineland Elementary School District full ownership, both legal and equitable, in and to the aircraft in suit.

9. The District Court erred in ruling that the defendant Vineland Elementary School District sold and transferred and delivered to defendants George C. Finn and Charles C. Finn all of its right, title, and interest in and to the aircraft in suit.

* * * * *

14. The District Court erred in failing to award damages in favor of plaintiff and against defendant Vineland Elementary School District for breach of the Form 65 Agreement (Plaintiff's Exihibit 1).

* * * * *

17. The District Court erred in ruling that it had jurisdiction to grant affirmative relief on the Counterclaim of the defendants George C. Finn and Charles C. Finn.

* * * * *

22. The District Court erred in ruling that as between plaintiff and all defendants the defendants Finn had the right to possession of the aircraft in suit on July 3, 1952, and at all times thereafter, and in awarding damages to the said defendants Finn on their Counterclaim for loss of use of said aircraft during said period, for the following reasons:

(*a*) During the described period plaintiff had the right to possession of the aircraft in suit.

(*b*) During the described period the defendant Vineland Elementary School District had a right to possession of the said aircraft superior to that of the defendants Finn.

(c) During the period in question the defendant International Airport, Inc., had a right to possession of the said aircraft superior to that of the defendants Finn.

23. The District Court erred in awarding damages for loss of use of the aircraft in suit for a period subsequent to the date of judgment herein.

INTRODUCTION AND SUMMARY OF ARGUMENT

The two principal divisions of this brief relate respectively, first, to the Government's right to recover from the various appellees on its original claim and, second, to the Government's freedom from liability under the Finn counterclaim, even assuming that the Government's original claim should be denied. In dealing with the former issue, we show that the conditions of the transfer to Vineland which were violated by the Vineland's transfer of the plane to the Finns are set forth in the WAA Form 65 Agreement executed by the school in applying for surplus aircraft. The court below ruled that the terms and conditions of that Agreement must be ignored or construed to be nugatory as contrary to the governing provisions of the Surplus Property Act of 1944 and War Assets Administration Regulation 4 (R. 127–136, 157). In Part I (A), *infra*, pp. 22–31, we show that the relevant provisions of the War Assets Administration Regulation 4 and WAA Form 65 are not only consistent with the statute but are in large part required by its terms. To achieve the purposes of the educational disposal program, some restrictions on transfers were necessary, and the Act gave the Board established by the Act wide powers to establish effec-

tive regulations and gave the disposal agency broad discretion in formulating specific terms and conditions. Moreover, an examination of subsequent related enactments and their legislative history makes it clear that Congress has always intended the imposition of restrictions of the type here involved and that they should be enforced in the manner undertaken by the Government in this case. Similarly, in Part I (B), *infra*, pp. 31–36, we demonstrate that the provisions of WAA Form 65 are consistent with Regulation 4. While the Regulation prescribes certain conditions for the transfer of planes to educational institutions, these conditions plainly were intended as a minimum which must be required and leave each of the several disposal agencies free to impose such additional conditions as it may deem necessary or desirable. Consequently, the requirements contained in WAA Form 65 which are in addition to those minimum conditions cannot be said to contravene Regulation 4.

Part I (C), *infra*, pp. 36–47, deals with the interest in the plane retained by the Government and its right to repossess the plane upon the breach of the terms of WAA Form 65 involved in Vineland's transaction with the Finns. We demonstrate first that the purpose and effect of WAA Form 65 was to preserve for the Government a right to retake the plane upon a breach or violation of its terms. We suggest that, in view of the power of Congress to dispose of Government property in any manner it deems appropriate, it is not necessary to categorize the exact nature of the Government's interest, which, like many commercial transactions, may fall in one or more categories (*i. e.*, here, a bailment, a trust, or a determinable fee). Whichever of these categories describes the Government's interest most precisely, the Government is entitled to recover the plane upon a breach of the terms of the transfer. The Finns and International took the plane with knowledge of the terms under which the plane was delivered to Vineland, and therefore their acquisition of the plane did not free it from the restrictions or cut off the Government's right to recover the plane for breach of the conditions.

In any case, as we show in Point I (D), *infra*, pp. 47–50, defendants are estopped to deny that the Government retained a property interest in the plane so as to secure performance of the crucial conditions or to deny that those provisions are valid

and consistent with the governing Act or regulation. With full knowledge of the disposal agency's understanding that those terms were a fundamental part of the contract and that they operated to retain a property interest in the Government, Vineland accepted delivery of the plane from the Government and acquiesced in this understanding for more than four years. The Finns and International similarly were aware of the Government's understanding. In these circumstances, defendants cannot, at the same time that they are asserting title to the plane by reason of the transfer from the Government, challenge the validity of the transfer. Moreover, if the transfer under the terms of WAA Form 65 were beyond the authority of the disposal agency, it was totally void and no interest in the plane has ever passed from the Government to Vineland, or *a fortiori,* from the school to the Finns or from the Finns to International.

Finally, in Part I (E), *infra,* pp. 50–55, we indicate precisely wherein the terms of WAA Form 65 were contravened by Vineland's transfer to the Finns, and we point out that even if the Government were not entitled to recover the plane, it should at least have been awarded damages against Vineland for breach of contract. If the district court's ruling that Vineland transferred all its right, title, and interest in the plane to the Finns is upheld, Vineland violated the prohibitions in WAA Form 65 against sale of the plane while still suitable for educational use and without first reducing it to its basic material content. At the trial, and in its appeal to this Court, Vineland has urged that title was never transferred to the Finns. If Vineland is correct, Vineland's actions *vis a vis* the Finns were still inconsistent with the terms of the Government's transfer to it since Vineland allowed the Finns to use the plane for flight purposes and ended its use for educational purposes, contrary to the express provisions and purpose of WAA Form 65. The Finns' custody of the plane, which on its face violates Form 65, resulted from Vineland's negligence in failing to make any independent inquiry as to the alleged Governmental releases, in spite of Vineland's previous difficulties with the same type problem and its familiarity with Federal and State agencies which could have settled the matter. Furthermore, the surrender of the plane to the Finns, coupled with the title documents given to the Finns by Vineland, might have per-

mitted them to convey good title to a *bona fide* purchaser, even though Vineland had not intended to convey title to the Finns, contrary to the spirit, if not the letter, of the restrictions on sales.

In Point II, *infra*, pp. 55–73, we urge that the court below erred in awarding judgment on the Finns' affirmative counterclaim. In Part II (A), *infra*, pp. 56–66, we show that the district court lacked jurisdiction to entertain such an affirmative counterclaim against the United States. The court below reasoned that there was jurisdiction over the counterclaim because the Government's use of claim and delivery procedure amounts to a taking, within the meaning of the Fifth Amendment, for which there must be just compensation, and because the Government impliedly consented to this counterclaim when it brought the action and utilized claim and delivery procedure. Under well-established principles, however, the Government's action could not be considered a Fifth Amendment taking since the Government claimed title to the plane and since the United States Attorney had no authority to effect such a taking. But even if it were a Fifth Amendment taking, the amount of the counterclaim greatly exceeds the jurisdictional limit of the district court for such actions, and there has been no consent to such a suit by way of counterclaim, rather than as an original action. With regard to the implied consent, based upon *United States* v. *The Thekla*, 266 U. S. 328, found by the district court, we point out that the authorities cited to support that contention have been carefully limited by the Supreme Court to a special problem in the field of admiralty litigation and that it is fundamental to the principle of sovereign immunity that only Congress may waive the immunity of the United States.

In addition, in Part II (B), *infra*, pp. 66–73, we demonstrate that the Finns were not entitled to recover on their counterclaim, even if the court below had jurisdiction to entertain that action, because they had neither title nor immediate right to possession of the plane when it was sequestered by the Government. The record shows that the Finns obtained custody of the plane from Vineland by representing that the Government had consented to a sale, and the jury found that Vineland did not intend to transfer title until that approval was

secured. Likewise Vineland's contract with the Finns provided that the sale was contingent upon the Finns' prior performance of their duties under the contract. Since Governmental consent was never obtained and since the Finns did not supply substantially the promised consideration, the Finns did not obtain title from Vineland and had no basis for a claim of a right to possession. Moreover, Vineland's sale to the Finns, even if intended, would have been void as contrary to the California statutes governing disposal of school district property. But, assuming that the Finns did obtain title from Vineland, it is clear that International had the [redacted] right to possession of the plane at the time this action was commenced. International's right was firmly established by an order of the Los Angeles Superior Court and by the rulings of the court below. Indeed, the Finns had possession of the plane at the time the Government sequestered it only because they had prevented International from obtaining the plane after International had secured it under California claim and delivery procedure.

ARGUMENT

I

The restrictions of WAA Form 65 under which the Government transferred the plane to Vineland are valid and Vineland's breach thereof entitled the Government to possession

In applying to the Government for surplus aircraft, Vineland executed WAA Form 65 (R. 15–16). Among the terms and conditions there agreed to by Vineland were (1) that the plane being acquired was for the *sole use*[13] of a public (*i. e.*, tax supported) institution for a specific *non-flight* purpose (here, instruction) (paragraph 2); (2) that the plane would "not be used for any actual flight purposes" (paragraph 6); and (3) that the plane when unfit for the stated purpose would "be sold only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content" (paragraph 7).

[13] Emphasis supplied throughout unless otherwise indicated.

The court below ruled that despite these conditions and restrictions, the Government's transfer to Vineland operated to vest full and unencumbered title in Vineland, leaving it free, as Vineland undertook here, to sell the plane for commercial flight purposes. This holding, the district court based upon its conclusion that these restrictions exceeded the permissible limits prescribed in Section 8304.11 (b) (2)–(3) of Regulation 4 of the War Assets Administration (32 C. F. R. 1946 Supp. Sec. 8304.11 (b) (2)–(3)), and that even the restrictions required by that regulation were invalid under the Surplus Property Act of 1944. Consequently, the court held that the disposal agency was without authority to impose the terms and conditions set out in WAA Form 65.

Since it is well established that Congress can constitutionally dispose of federal property in any manner and subject to any reservations or conditions which are appropriate in the public interest (see, *e. g., Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 338; *United States* v. *City and County of San Francisco,* 310 U. S. 16, 30), there is no question that the authority of the disposal agency to impose the terms of WAA Form 65 on transfers to educational institutions depends immediately on the authorization contained in War Assets Administration Regulation 4 and ultimately upon that in the Surplus Property Act of 1944. We believe that the statute gave the disposal agency broad authority to establish and enforce these as well as other appropriate terms and conditions, that the WAA Form 65 restrictions are not prohibited by Regulation 4, that by virtue of WAA Form 65 the Government retained a proprietary interest in the plane, entitling it to recovery of the plane upon breach of the conditions, and that in any case, defendants are estopped to deny the validity of the restrictions agreed to by Vineland in originally accepting the Government's transfer of the plane to it. In addition, we believe that even if the restrictions are only contractual in nature, the United States was entitled to recover from Vineland damages for breach of the restrictions.

A. The WAA Form 65 restrictions were within the broad discretion vested in the disposal agency by the Surplus Property Act

1. *The restrictions are contemplated by the Surplus Property Act.* Section 9 (a) of the Surplus Property Act (*infra*, p. 82) provides that the "Board [originally the Surplus Property Board and later the War Assets Administration] shall prescribe regulations to effectuate the provisions of this Act," and that "[i]n formulating such regulations, the Board shall be guided by the objectives of this Act." Section 9 (b) (*infra*, p. 82) continues "[r]egulations issued pursuant to subsection (a) may, except as otherwise provided in this Act, contain provisions prescribing the extent to which, the times at which, the areas in which, the agency by which, the prices at which, *and the terms and conditions under which*, surplus property may be disposed of * * *"

Disposition of property to educational institutions is dealt with specifically in Section 13 of the Act, *infra*, p. 83. Subsection (a) of that section commences with the provision that "[t]he Board shall prescribe regulations for the disposition of surplus property to States and their political subdivisions and instrumentalities" and "in formulating such regulations the Board shall be guided by the objectives of this Act and shall give effect to the following policies to the extent feasible and in the public interest." [14] The policies relevant to dispositions under this provision are set out in Section 13 (a) (1) (A) *infra*, p. 83, which states that "[s]urplus property that is appropriate for school, classroom, or other educational use may be sold or leased to the States and their political subdivisions and instrumentalities * * *" and in Section 13 (a) (1) (C), *infra*, p. 83, which adds that "[i]n fixing the sale or lease value of property to be disposed of under subparagraph (A), * * * the Board shall take into consideration any benefit which has accrued or may accrue to the United States from the use of such property by any such State, political subdivision, instrumentality, or institution." The only other restriction on the manner of dis-

[14] It should be noted that the property subject to disposal under Section 13 (a) was considered as having commercial value. This is clear from Section 13 (b), *infra*, p. 84, which expressly provides for the donation to educational institutions of property which is without commercial value.

posal to educational institutions appears in Section 13 (a) (2), *infra,* p. 84, which states that "[s]urplus property shall be disposed of so as to afford public and governmental institutions, non-profit or tax-supported educational institutions * * * an opportunity to fulfill, in the public interest, their legitimate needs."

The ruling of the court below, that the Act required the disposal agency to convey all its interest in surplus property without the reservations and conditions here involved (R. 136) is not supported by the statute or the legislative history of the Act and subsequent statutes. Section 9, which governs disposals generally, clearly authorizes the Board and the disposal agency to dispose of property in whatever manner appropriate in the circumstances presented so long as the disposal technique is not otherwise prohibited or contrary to the Act's purposes. Cf. *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110, 116; *United States* v. *Newbury Mfg. Co.,* 36 F. Supp. 602 (D. Mass.).[15] And Section 13 (a), in dealing more directly with educational disposals, does not further limit that authority, since it speaks of "the *disposition* of surplus property" and "*transfers*" of the property, and reiterates in three separate places that property being disposed of to educational institutions may be "sold or *leased.*" [16]

This broad delegation of authority by Congress was motivated by a recognition of the difficulty and undesirability of prescribing uniform requirements to be applicable in all of the infinite variety of situations in which surplus property was to be disposed of. See S. Rep. No. 1057, 78th Cong., 2d sess., pp. 2–6. To permit the disposal agencies to adjust the terms and conditions of a transfer so as to take into account the particular

[15] In *United States* v. *Newbury, supra,* it was held that the imposition of restrictions on resale by a department of the United States in a sales contract was valid under a statute authorizing sales of certain property upon such terms "as the head of such department shall deem expedient." The court said (36 F. Supp. at 605):

> * * * I can discover nothing unreasonable in a provision that restricts the seller to the export market. The restriction did not tend to injure the public; on the contrary, the department may very well have deemed it conducive to the economic welfare of the United States. * * *

[16] In addition to Sections 13 (a) (1) (A) and 13 (a) (1) (C), *supra,* p. 22, "sold or leased" appears in Section 13 (a) (1) (B). See *infra,* p. 83.

needs and circumstances of each situation, Congress stressed the broad discretion of the disposal agencies in Sections 15 (a) and 15 (b), *infra*, p. 84: "the agency may dispose of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, *and upon such terms and conditions, as the agency deems proper* * * *" and "[a]ny owning agency or disposal agency may execute such documents for the transfer of title *or other interest* in property or take such other action as it deems necessary to carry out the provisions of this Act * * *."

Certainly, far from being inconsistent with those provisions, the WAA Form 65 prohibitions against sale by an educational institution of property where the property is still useful for educational purposes or where it has not been reduced to its basic material content, seem clearly within the disposal agency's broad discretion. Indeed, an examination of the purposes of the Act detailed in Section 2, *infra*, pp. 81–82, shows that these conditions are not only permitted but are almost compelled by the Act. Congress wanted to insure that the property would be put to its most effective use (see Section 2 (a), *infra*, p. 81) as rapidly and efficiently as possible (see Sections 2 (m) and 2 (r), *infra*, p. 82). The restriction against sale of the plane by a school while it was still useful for educational purposes is an effective means of carrying out those Congressional intentions. Moreover, the diversion of the plane from educational use would prevent the Government from obtaining the fair value of the plane as required by Section 2 (t), *infra*, p. 82, since the cash payment required from the school was only a part of the consideration to be received by the Government with the remainder being the benefits generally derived from use by educational institutions. See Section 13 (a) (1) (C), *infra*, p. 83. It is clear that the latter benefit will be received, as the Government expected in fixing the cash payment, only where the plane is used for educational purposes as long as so usable.

The statutory basis for the prohibitions against use for flight purposes and against sale of the plane by Vineland without first reducing it to its basic material content can be seen from the stated purposes in Sections 2 (h), 2 (j), 2 (m), and 2 (q),

infra, pp. 81–82. The nominal cash payment demanded from educational institutions acquiring planes for educational purposes ($200 in the case here of a C–46A airplane worth at least $5,000) would tend to convert educational institutions into mere conduits for speculators, contrary to Section 2 (h), *infra*, p. 81, unless stringent restrictions on the institution's ability to sell and use the plane were imposed. Moreover, absent those limitations, the school or one purchasing from it would be in a position to reap, contrary to Section 8 (q), *infra*, p. 82, unusual and excessive profits by selling the plane for commercial use. And, in view of the fact that over 11,000 planes were transferred to educational institutions, the policies announced in Sections 2 (j) and 2 (m) might well have been defeated if schools were permitted to sell the planes for nonscrap flight purposes, since dislocations of the domestic economy, international economic relations, the free market and competitive prices would likely result.[17] That Congress did not intend these transfers to educational institutions to be merely an indirect means of disposing of surplus property into commercial channels—and this without regard to the limitations imposed in regard to direct commercial sales—is further indicated by Section 13 (a) (2) of the Act, which provides in part:

> Surplus property shall be disposed of so as to afford * * * educational institutions * * * an opportunity to fulfill, in the public interest, *their legitimate needs.*

Plainly, disposals to educational institutions were to fulfill their needs alone, not the needs of others.

The court below cited Sections 2 (b), 2 (d), 2 (f), 2 (p), and 2 (s) of the Act (*infra*, pp. 81–82) as showing that Vineland's

---

[17] Fear of competition from underpriced Government surplus was acutely felt by the aircraft industry as well as others. See RFC, Surplus Property News, p. 8 (October, 1945):

> The policies which govern the disposal of surplus aircraft have been worked out over a period of more than a year and a half after thorough and detailed consultation with all interested elements in the United States.
>
> The Pague Committee report, on which those policies are largely based, declared that dumping of surplus aircraft regardless of price is not to be considered.

sale to the Finns was consistent with the purposes of the Act of aiding new small business concerns, assisting returning veterans, and furthering the transportation industry (R. 135). But, those purposes are pertinent to direct commercial sales by the Government, not to disposals to educational institutions, as to which, the objectives discussed *supra*, pp. 24–25, are relevant. Not only is there no suggestion in the Act that all of its twenty objectives are to be satisfied equally in every disposal, but it would be impossible to achieve such a goal since in many instances any attempt in that direction would result in an irreconcilable conflict. Consequently, far from imposing these objectives as mandatory requirements, Congress listed the objectives merely as "guides" to the disposal agency (see Section 9 (a), *infra*, p. 82; Section 13 (a), *infra*, p. 83), with the agency having the discretion of determining how best to achieve these "general objectives" (S. Rep. No. 1057, 78th Cong., 2d sess., p. 3) in a particular situation.

That Congress did not intend all the 20 objectives to be equally applicable to each disposal is also manifest when these objectives are examined against the other provisions of the Act. In several instances, a particular provision is plainly directed at implementing one specific objective. Thus, for example, Section 17 dealing with disposals in rural areas is directed at implementing the objective in Section 2 (e) (*infra*, p. 81) of fostering "family-type farming as the traditional and desirable pattern of American agriculture." Similarly, subsections (b), (d), (f), (p) and (s), which the court below stressed are directed not to dispositions to educational institutions under Section 13, but rather to dispositions to veterans under Section 16, to small business under Section 18, and generally to private persons. In contrast, it should be noted that Section 13 (a) (1) (A) expressly deals with the disposition to educational institutions of "surplus property that is appropriate for school, classroom, or other educational use." And there is no question but that the original disposal of surplus property to educational institutions furthers the objectives of the Act. This being the case, how can it be said that a continuing restriction on the use of the property for educational purposes, including purposes of research and experiment, vio-

lates, or is contrary to, the Act's objectives? The provisions of WAA Form 65 restricting the use and further disposition of aircraft merely constitutes the means employed by the disposal agency to assure the continued utilization of the aircraft for educational purposes.

Moreover, the purposes set forth in the Act were designed to be guides to the disposal agency, not to assist the educational institutions in selecting subsequent purchasers. Under the reasoning of the court below, the restrictions of WAA Form 65 would be valid and enforceable if, by chance, a school decides to sell a plane which the Government transferred to it, to a large established business operated by nonveterans, although they would be invalid, as the court ruled, if the school sells the plane to veterans seeking to establish their own business, as the Finns assert they are undertaking to do.[18] Plainly, Congress did not expect the validity of the restrictions as originally imposed by the disposal agency to turn upon the nature of the school's subsequent sales of the property.

In these circumstances, there seems little question that the conditions relied upon by the Government in this action are wholly reasonable means of effecting the purposes of the Act.

2. *The legislative history demonstrates that Congress intended such restrictions.* Any doubt that the Surplus Property Act authorized the imposition of these restrictions is dissipated by the legislative history of the Act of 1944 and the subsequent congressional enactments in this field, which make it clear that Congress expected that transfers of surplus property be made upon such reservations and conditions. In debate on the House floor in regard to acceptance of the Conference Report concerning the 1944 Act, Representative Manasco, leader of

---

[18] It is noteworthy that under its contract with the Finns, Vineland was to receive consideration valued at about $21,000 (see *supra*, p. 7, fn. 4) for a plane for which Vineland had paid only $200. Further, the Finns, under their lease arrangements with International, *supra*, p. 10, were to receive $5,000 a month for an eighteen month lease of the plane or $90,000. Certainly, such transactions are contrary to the Act's objectives of discouraging disposal of surplus property to speculators (Section 2 (h), *infra*, p. 81) and of preventing the making of unusual and excessive profits (Section 2 (t), *infra*, p. 82).

the House conferees, made it clear that schools receiving property at special reduced rates would be obliged to use it for educational purposes since that use constituted an important part of the consideration for the transfer.[19] The Conference Report stated a like purpose with reference to the administration of educational disposals. H. Rep. No. 1890, 78th Cong., 2d Sess., p. 25.

In the Federal Property and Administrative Services Act of 1949 (63 Stat. 377, as amended, 40 U. S. C. 471), Congress made certain significant amendments to the surplus property disposal program. The power of the administrative agencies, however, was unchanged with regard to their authority to impose restrictions on transferee institutions in order to insure compliance with the purposes of the Act. Section 501 (40 U. S. C. 473), *infra*, p. 87, for example, stated that "all policies, procedures, and directives prescribed * * * by any officer of the Government under the authority of the Surplus Property Act of 1944 * * * shall remain in full force and effect unless and until superseded * * *." At the same time, the 1949 Act spelled out in somewhat greater detail the powers of the Administrative agency to impose and enforce those restrictions. Section 203 (k) (2) (A), 40 U. S. C. 484 (k) (2) (A), *infra*, p. 86, provides that the Federal Security Administrator has the authority "in the case of property transferred pursuant to the Surplus Property Act of 1944 * * * for school, classroom or other educational use * * *."

> * * * (i) to determine and enforce compliance with the *terms, conditions, reservations, and restrictions* contained in any instrument by which such transfer was made;

---

[19] Mr. VOORHIS of California. I wish the gentlemen would explain to the House what the provisions of the conference report on the disposal of property to schools and States and instrumentalities of States and subdivisions mean. I am not sure I understand that.

Mr. MANASCO. Under the terms of the conference agreement, these machines, tools, equipment, and so forth that are suitable for classroom use may be leased to the schools, taking into consideration the common good that accrues from that lease as part of the consideration.

Mr. VOORHIS of California. Does that mean that can be taken into account in determining what the terms of the lease or sale might be?

Mr. MANASCO. That is correct. [90 Cong. Rec. 7851]

(ii) to reform, correct, or amend any such instrument by the execution of a corrective, reformative, or amendatory instrument where necessary to correct such instrument or to conform such transfer to the requirements of applicable law; and

(iii) to (I) grant releases from any of the *terms, conditions, reservations, and restrictions* contained in, and (II) convey, quitclaim, or release to the transferee or other eligible user any *right or interest reserved to the United States* by, any instrument by which such transfer was made, if he determines that the property so transferred, no longer serves the purpose for which it was transferred or that such release, conveyance, or quitclaim deed will not prevent accomplishment of the purpose for which such property was so transferred: *Provided,* That any such release, conveyance, or quitclaim deed may be granted on, or made subject to, such terms and conditions as he shall deem necessary to protect or advance the interests of the United States.[20]

Congress thus clearly recognized that restrictions had been imposed on previous transfers and expressed approval.

In addition, in 1953 extensive hearings were held by the House Committee on Government Operations to examine

---

[20] As stated in the report of the House Committee on Expenditures in the Executive Department in regard to this provision (H. Rept. 670, 81st Cong., 1st sess., p. 15) :

> * * * Under the Surplus Property Act of 1944, as amended, surplus property has been transferred to States and political subdivisions thereof, and to tax-supported or nonprofit educational and medical institutions for specified uses, subject to various conditions and reservations. This section would permit the head of the interested Government agency, subject to disapproval by the Administrator of General Services, to enforce compliance with such conditions or reservations, to reform or correct the instruments of transfer by which such condition or reservations are imposed, and to grant releases (including conveyances by quitclaim deed, in the case of real estate) from such conditions and reservations. Such releases are to be conditioned upon findings that the property no longer serves the purpose for which the transfer was made, or that release will not prevent accomplishment of the purpose of such transfer, and upon such other conditions as may be necessary to protect or advance the interests of the United States.

numerous complaints received that surplus property was being used for purposes contrary to those intended by Congress and, in some instances, in contravention of restrictions imposed by the disposal agencies. Throughout these hearings it was clear that the restrictions imposed by disposal agencies on subsequent use or sale were understood to have been authorized by Congress. See *Hearings before the House Committee on Government Operations on the Durable Surplus Property Program,* 83d Cong., 1st sess., *passim,* particularly pp. 76–103.

More recently, the Federal Property and Administrative Services Act of 1949 was amended by Public Law 61, 84th Cong., 1st sess. (H. R. 3322). Section 4 (a), *infra,* p. 88, of this new enactment provides:

> * * * In the case of personal property donated or sold at a discount for educational, public health or memorial purposes, including research, under any provision of law enacted prior to the enactment of the Federal Property and Administrative Services Act of 1949, *no term, condition, reservation, or restriction imposed on the use of such property shall remain in effect after the date of the enactment of this Act. This subsection shall not be deemed to terminate any civil or criminal liability arising out of a violation of such a term, condition, reservation, or restriction* which occurred prior to the enactment of this Act, if a judicial proceeding to enforce such liability is pending at the time of, or commenced within one year after the enactment of this Act.

Here, again, Congress recognized the outstanding restrictions, and, though they were released for administrative reasons (H. Rep. No. 206, 84th Cong., 1st sess., p. 13),[21] Congress expressly saved the Government's rights to enforce these restrictions in actions such as the instant proceeding. See H. Rep. No. 206,

[21] "Section 4 (a) of the committee amendment is intended to facilitate and reduce administrative costs at the Federal, State, and institutional levels by removing the terms, conditions, reservations, or restrictions which were imposed pursuant to statutes enacted prior to the enactment of the Federal Property and Administrative Services Act of 1949. It has heretofore been necessary for donees to keep separate account for property depending upon which statute and which set of conditions attached thereto."

84th Cong., 1st sess., p. 13; S. Rep. 351, 84th Cong., 1st sess., p. 2. Surely, if Congress had believed these restrictions to have been originally without statutory basis, it would have stricken down all restrictions previously imposed, rather than allowing the Government a year within which to institute actions to enforce them. Indeed, considerable testimony was presented to the responsible committee that these restrictions were important to the protection of the goals of the educational disposal program. See *Hearings before the House Committee on Government Operations on H. R. 3322,* 84th Cong., 1st sess., pp. 58, 61, 67, 74, 100. This repealing provision of the Act was reported favorably on the sole ground that the outstanding restrictions imposed great administrative burdens upon federal and state agencies alike in insuring that the terms were obeyed. See H. Rep. No. 206, 84th Cong., 1st sess., p. 13; see, also, *Hearings before the House Committee on Government Operations on H. R. 3322, supra,* at pp. 20, 30, 31, 32, 35, 37, 314.

It is thus plain that Congress intended by the Surplus Property Act of 1944 to sanction restrictions of the type here involved in connection with transfers to educational institutions and to make these restrictions enforceable, as the Government has sought to do in the instant case. Therefore, the court below erred in ruling that the restrictions of WAA Form 65, as well as the less stringent restrictions of WAA Regulation No. 4 (see, *infra,* pp. 33–34), were inconsistent with, and so invalid under, the Surplus Property Act of 1944.

B. War Assets Administration Regulation No. 4 authorized the restrictions in WAA Form 65

Section 5 (a) of the Surplus Property Act of 1944 originally provided for a Surplus Property Board to administer the Act. 58 Stat. 765, 768. However, prior to any of the events significant in this case, the Surplus Property Board was abolished and its functions were transferred first to the Surplus Property Administration (59 Stat. 533) and thereafter to the War Assets Administration. Ex. Order No. 9689, 11 Fed. Reg. 1265; Ex. Order 9709, 11 Fed. Reg. 3149. In exercising the authority to issue regulations for the disposal of surplus aeronautical property, vested in it by Sections 9 (a) and 13 (a) of the Act,

the War Assets Administration issued its Regulation 4 (11 Fed. Reg. 5868, 32 C. F. R. (1946 Supp.) 8304.1 *et seq.*). Section 8304.11 of this regulation (11 Fed. Reg. 5870) dealt with "disposals for educational and public health purposes."

Since the transfer of the plane to Vineland here involved was made pursuant to WAA Form 65, a form also issued by the War Assets Administration, it is important to note at the outset that the holding of the court below that the restrictions contained in WAA Form 65 are contrary to the provisions of Regulation 4 in effect overrides the consistent construction of the administrative agency which issued both Regulation 4 and Form 65.[22] In so ruling, the court below failed to follow established principles in this area. As stated by the Supreme Court in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, in regard to this very matter (325 U. S. at 413–414):

> * * * Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. The legality of the result reached by this process, of course, is quite a different matter. In this case the only prob-

[22] In addition to WAA Form 65 itself, which shows the understanding of the War Assets Administration as to the bounds set by its Regulation 4, the administrative interpretation is revealed in letters from the administrative agencies ((Plaintiff's Exhibits 14 and 15; Vineland's Exhibit E; Finns' Exhibits K–7, K–9, K–22), the testimony of the former Chief of the Compliance Section of the Surplus Property Utilization Division of the Federal Security Agency (R. 686–87, 690–94, 697–699, 702–04, 717, 741, 760–64, 779, 790–91, 803), and the testimony of the present Chief of the Surplus Property Branch of the Office of the General Counsel for the Department of Health, Education and Welfare (R. 822–25, 830, 844, 852–53), all of which clearly shows that the agencies charged with the administration of this program consistently believed that the terms of WAA Form 65 were valid and consistent with Regulation 4.

> lem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.

And, as noted, by this Court, where the interpretations by an administrative agency of its own regulation are "not irrational, its interpretations are binding upon the courts." *Porter* v. *Crawford & Doherty Foundry Co.*, 154 F. 2d 431, 433 (C. A. 9), certiorari denied, 329 U. S. 720, and cases there cited; see, also, *Mechanical Farm Equipment Distributors, Inc.* v. *Porter*, 156 F. 2d 296, 297–298 (C. A. 9), certiorari denied, 329 U. S. 771; *Bowles* v. *Wheeler*, 152 F. 2d 34, 41 (C. A. 9). In the instant case, the interpretation of Regulation 4 embodied by War Assets Administration in its Form 65 is far from "plainly erroneous or inconsistent" with the regulation, let alone "irrational."

Under Section 8304.11, the provision of Regulation 4 dealing with disposals to educational institutions, the disposal agency, subject to the approval of the War Assets Administration, was empowered in subsection (a), *infra*, p. 93, to determine which items were available for delivery to educational institutions, to fix prices which would reflect the benefit that may accrue to the United States from the use of such property for educational purposes, and to dispose of that property to educational institutions at the prices so approved. Section 8304.11 then goes on in subsection (b), *infra*, p. 93, to instruct the disposal agency to "establish procedures pursuant to which educational or public-health institutions or instrumentalities may make written application for surplus aeronautical property available for disposal to such institutions or instrumentalities." The broad discretion thus given to the disposal agency to define the terms and conditions on which it would dispose of surplus property was limited only by the further requirements set out in Section 8304.11 (b) that:

> * * * Such procedures *shall include* (1) certification that the applicant is an educational or public-health institution or instrumentality as defined in Section 8304.1, (2) a certification of the purposes for which the property

> is to be acquired, and in the case of aircraft an agreement that it will not be flown except for purposes of research or experiment in connection with the science of aeronautics, and (3) an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap.[23]

The court below held the restrictions contained in WAA Form 65 invalid under these provisions of the regulation because, according to the court, the restrictions "are contradictory and cannot stand together" (R. 133–134, see also R. 156–157). The court noted (R. 133):

> Thus Form 65, as executed, prohibits entirely all flight use, whereas subsection (2) of the applicable regulation then permitted both research and experimental flight. Moreover the restrictions as to disposal contained in Form 65 are without limit in point of time, whereas subsection (3) of the amended regulation limits restrictions upon disposal to the period of three years next following purchase.

However, while it is true that the conditions required by Regulation 4 are less stringent than those imposed by WAA Form 65, this does not mean that the WAA Form 65 restrictions were contradictory to those of Regulation 4. There is no doubt that the Regulation's requirements are fully embraced within the terms of WAA Form 65; the difficulty encountered by the court below, accordingly, was not that WAA Form 65 imposed less restrictions than Regulation 4, but rather that it imposed more.

Far from contradicting Regulation 4, the more stringent restrictions of Form 65 were clearly contemplated by the regulation. Unlike the earlier regulations referred to by the court

---

[23] Section 8304.1 (b) (4) of the Regulation (11 Fed. Reg. 5868, 32 C. F. R. 8304.1 (b) (4) (1946 Supp.)) defines "Scrap" as "property that has no reasonable prospect of sale except for its basic material content." See also, *infra*, pp. 54–55.

below (R. 133), which prescribed the restrictions to be imposed in connection with such transfers and appear to permit no deviation,[24] the regulation here, as already indicated, *supra,* p. 33, left to the disposal agency broad discretion in establishing procedures for the disposal of surplus aircraft to educational institutions. The regulation set out certain conditions which the disposal agency "shall include" and while it was mandatory in the sense that it required at least these conditions, it imposed no restriction on the agency's authority to require such further and additional conditions as it deemed necessary or desirable. Thus, the regulation was not intended to set forth *all* the conditions or terms under which the transfers were to be made. This was left to the disposal agency which has the power to insert whatever conditions it deems appropriate, subject only to the minimum conditions which the regulation required that the disposal agency "shall include." Cf. *Gilbert & Secor* v. *United States,* 8 Wall (75

---

[24] The regulation appearing in 10 Fed. Reg. 5460 referred to by the court below (R. 133) provided:

> SEC. 8304.4 (c). The buyer shall file with the disposal agency a certificate under oath duly notarized that such buyer is an educational institution as defined in Sec. 8304.1 (e), that the property is being acquired to be used only for non-flight instructional, research, or experimental purposes, that it will not be used for any flight purposes, and that the property will be disposed of only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content.

The regulation published in 10 Fed. Reg. 10362, also cited by the court below (R. 133), stated:

> SEC. 8304.4 (c). The buyer shall file with the disposal agency a certificate under oath duly notarized that such buyer is an educational institution as defined in Sec. 8304.1 (e) or a State or local government as defined in Sec. 8304.1 (i), that the property is being acquired to be used only for non-flight instructional, research, experimental, or memorial purposes, that it will not be used for any flight purposes and that the property will be disposed of only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content.

In this connection, it may be noted that the conditions in WAA Form 65 differ materially from those contained in these earlier regulations, which were implemented by an earlier form (Form No. SWPD–DP–35, Finns' Exhibit B) setting forth in *haec verba* the conditions required by these regulations.

U. S.) 358, 359;[25] *United States* v. *Linn,* 15 Pet. (40 U. S.) 290; *American Smelting Co.* v. *United States,* 259 U. S. 75; *Lomax Transportation Co.* v. *United States,* 183 F. 2d 331 (C. A. 9); *United States* v. *B. & O. R. R.,* Fed. Cas. No. 14510 (D. W. Va.). The minimum conditions of sale incorporated in the regulation are for the protection of the Government, not the educational institution to which the plane is transferred, and do not preclude the disposal agency from requiring terms that are more favorable to the Government or designed more effectively to assure compliance with the educational purposes intended to be served by the transfer. In these circumstances, it appears plain that the conditions of WAA Form 65 are not "irrational" nor "plainly erroneous or inconsistent" with Regulation 4 and hence there is no warrant for the ruling below that the WAA Form 65 conditions cannot stand.

C. WAA Form 65 operated to retain a proprietary interest to the plane, entitling the Government to possession of the plane upon Vineland's breach of the conditions

The court below ruled that even if the conditions of WAA Form 65 are valid—and we have demonstrated, *supra,* pp. 22–36, that they are—the Government had conveyed title to Vineland so that the Government is not entitled to possession of the plane upon Vineland's breach of the conditions (R. 127–130). Examination of the provisions of WAA Form 65 and the context in which the transfer was made reveals, we believe, that

---

[25] In *Gilbert & Secor* an Act of Congress had directed the Secretary of the Navy to enter into a contract for the construction of a dock either with the plaintiff or another company, specifying that the

> * * * contracts could be made at prices that should not exceed by ten per cent the prices which have been submitted by either of said parties. * * *

Since the plaintiff had offered to build the dock for $732,905, the Secretary of the Navy could have contracted to have the dock constructed for ten per cent ($73,290.50) more. Plaintiff signed a contract calling for the smaller sum but subsequently brought suit for an additional amount. In rejecting plaintiff's claim that the statute was "itself an acceptance of certain proposals made by plaintiffs," the Supreme Court commented (8 Wall. at 361):

> * * * Did Congress mean to say, we accept your proposal, and give you ten per cent more than you have asked? Or did it mean to authorize the secretary to make the best terms he could, not exceeding that limit? Clearly it must have intended the latter.

WAA Form 65 was intended to retain for the Government the right to repossess the aircraft upon a breach of the conditions imposed. Like many commercial transactions, the transfer may fall into one or more of various categories of legal relationships such as bailment, trust or determinable fee. Whatever category applies, the Government, we submit, had title and right to possession of the plane upon Vineland's breach of the conditions in WAA Form 65.[26]

1. *Full title not passed to Vineland.* The holding below that the Government intended to pass full unencumbered title to Vineland is negated by the requirement of section 13 (a) (1) (C) of the Surplus Property Act of 1944, *infra,* p. 83, that the educational utilization of surplus property be treated as part payment therefor, by the necessity of attaining the objectives of Section 2 of the Act, *infra,* pp. 81–82, by the authority vested in the disposal agency by Section 15 of the Act to dispose of property upon such terms and conditions as the agency deems proper, by the inadequacy of the $200 cash consideration for the plane if for full legal title, and by the restrictions on use and alienation of the plane contained in the regulation and WAA Form 65. This conclusion is further buttressed by the negotiations leading up to the delivery of the plane and the actions of the parties thereafter which plainly manifest an understanding that the Government did not transfer "all its right, title and interest in the plane."

---

[26] In *United States* v. *School District No. 2*, 124 F. Supp. 570 (E. D. Mich.), pending on appeal, C. A. 6, No. 12423, the District Court found it "unnecessary to characterize the exact nature of the rights which the respective parties had in the surplus plane" since "[i]t is at least clear that the parties were aware at all times that the United States retained an interest in the aircraft" (124 F. Supp. at 573).

Indeed, recovery here could be predicated upon the Government's right to rescind the contract since violation of the crucial terms of WAA Form 65 was a substantial material breach. See *Restatement, Contracts*, secs. 317, 347. Moreover, one of those terms, the continued use of the plane for educational purposes, also represented a major portion of the consideration, so Vineland's premature sale established a right of rescission for failure of consideration. The right of rescission also defeats any claim by the Finns or International, since they took with notice of the contract terms. In the terminology of the Restatement, their possession was subject to a constructive trust in favor of the equitable owner, the United States. See *Restatement, Restitution*, sec. 175.

War Assets Administration Regulation 4 did not require that the disposal agency transfer all of the Government's interests in the airplane in suit to Vineland. See *supra*, pp. 33–36. Section 8304.11 (a) of Regulation 4, in conferring authority on disposal agencies to make disposals for educational purposes, carefully uses the term "disposal" and "to dispose" rather than the terms "sale" or "to sell." This is in marked contrast to other sections of the omnibus Regulation 4 relating to disposals into commercial channels. See, for example, Sections 8304.7,[27] 8304.8, 8304.9 (c). Furthermore, Section 8304.11 of the regulation, containing, as it does, the restrictions which a disposal agency must impose on the alienation and use of aircraft disposed of thereunder, is not consistent with an intent to provide for the transfer of the full title to the aircraft. Such restrictions do not conform with the traditional concept that the ownership of personal property implies the right to use and dispose of it freely.

The document which spells out in greatest detail the relationship between the Government and Vineland, WAA Form 65, not only falls far short of suggesting that full unrestricted title to the plane was thereby transferred to Vineland but, on the contrary, contains, as does Regulation 4, express restrictions on use and further disposition which are incompatible with an intent to transfer full title. Under the provisions of Form WAA 65, Vineland could acquire the plane only for its

---

[27] As supporting its conclusion that full title was intended to be transferred to Vineland, the court below relied upon the proviso in Section 8304.7 of the regulation (11 Fed. Reg. 5870, 32 C. F. R. 8304.7 (1946 Supp.), *infra* p. 92) that "after June 30, 1946, transport aircraft shall be disposed of only by sale." (R. 129.) However, an examination of the complete text of Section 8304.7 shows that it has no bearing on the instant transaction between the Government and Vineland. This section is designed to deal with the disposal of transport aircraft for flight purposes at prices which reflect the "potential earning power of the aircraft in relation to other models, its estimated economical life in scheduled and nonscheduled commercial service, the degree of modification required for conversion to civilian use and the relation between supply and demand." Although the airplane in suit might have been disposed of as a "transport aircraft," *i. e.*, for flight purposes, it was in fact disposed of under the educational program for educational purposes, a disposal governed by Section 8304.11, rather than Section 8304.7 with the price thereof fixed in accordance with Section 8304.54 *infra* p. 95.

own "sole use" (Par. 2; R. 15) and could use it only for restricted nonflight purposes, "Instruction, Research, Experiment" (Par. 2; R. 15). The plane could not be flown (Par. 2, 6; R. 15), it could not be used for commercial purposes of any kind (Par. 2; R. 15), it could not be sold within the first three years of Vineland's possession without prior written approval from the Government (Par. 7; R. 15), it could not be sold at any time if it was still serviceable for educational purposes (Par. 7; R. 15), and it could not be sold at any time without first being reduced to its basic material content (Par. 7; R. 15–16).

In addition to these reservations expressly placed on the transfer, Vineland's lack of an unencumbered title is evidenced by the fact that no bill of sale or certificate of title was given to Vineland (R. 125, 228–230); instead, Vineland acknowledged receipt of the plane on a "Release of Custody" form issued by the contractor who was storing the plane for the Government (Plaintiff's Exhibit 4), which form carries the typewritten legend "This aircraft was sold for educational use only." And so, we submit, the original papers describing the transfer do not contain any basis for a suggestion that the transfer was an absolute or unconditional conveyance of the Government's interest in the plane.

Also indicating that full title to the plane was not passed to Vineland is the fact that the total cash payment made by Vineland was the nominal amount of $200. Since at the same time the Government was selling similar planes to ordinary purchasers for $5,000—and the advisory jury and the district court found that to be the value of the plane at that time (R. 116, 150)—it would be unreasonable to assume, as the holding below of necessity does, that the Government was willing to convey its entire interest in the plane to educational institutions for only $200. If such were the case, the institution would be in a position not only to resell the plane contrary to the purpose of the Act for unusual and excessive profits, as is appellees' claim here, but also to defeat the very purpose for which the plane was transferred to it, *i. e.*, educational purposes. And since the nominal consideration of $200 was to be supplemented by the benefits from the

intended educational use,[28] it would seem clear that to achieve these purposes, the disposal agency would have to retain an effective control over the institution's use and disposition of the plane. Consequently, remembering that the disposal agency's primary interest was the achieving of the Act's purposes, rather than receiving damages for violation thereof, there should be little doubt that the restrictions imposed upon educational institutions, in connection with the transfers to them were proprietary, rather than contractual in nature. Only as a proprietary interest, entitling the Government to recovery of the plane upon breach of the restrictions, could these restrictions operate effectively in the discharge of this function of assuring that the property transferred was not improperly diverted from educational use to obtain excessive profits.

Finally, in interpreting this transfer of Government property it should be remembered that "any ambiguity in a grant is to be resolved favorably to a sovereign grantor—nothing passes but what is conveyed in clear and explicit language" (see *Great Northern Ry.* v. *United States,* 315 U. S. 262, 272), with "inferences being resolved not against but for the Government." See *Caldwell* v. *United States,* 250 U. S. 14, 20; see also *Wisconsin C. R. R.* v. *United States,* 164 U. S. 190, 202; *United States* v. *Michigan,* 190 U. S. 379, 401.[29]

The district court placed considerable stress on the fact that words such as "price," "sell," "sold," and "purchase" were

---

[28] In the Conference Report leading to the Surplus Property Act of 1944, the Committee stated that the provision for low-price sales to educational institutions "simply has the effect of treating the benefit so accruing to the United States as a medium of payment." See H. Rep. No. 1890, 78th Cong., 2d sess., p. 25. See, also, *supra*, p. 28.

[29] In this connection, it should be noted that considerations of public policy which, as the District Court noted (R. 130), have caused courts to strike down or avoid unreasonable restraints on alienation have no bearing on transfers authorized by Congress. It would be incongruous indeed for a constitutional act of Congress, which itself determines public policy, to be treated as against public policy. Moreover, contrary to the view expressed by the court below, the restraints imposed by WAA Form 65 would not be unreasonable, even if established by a private individual, since they serve to enforce the purpose of the transfer (*i. e.*, educational use). See *American Law of Property,* Sec. 26.28 (1954 ed.); *Restatement, Property,* Sec. 406, Comment i.

used in various documents, other than WAA Form 65, which described the transfer to Vineland (R. 128–129). However, these words are, of themselves, inconclusive as to the nature of the transfer. They do not necessarily require that full title be passed and consequently do not preclude the retention of an interest on the basis of which the property may be recovered upon breach of the valid restrictions. See *Williston on Sales*, Secs. 7, 8 (1948 ed.). Moreover, to the extent they have the meaning of full and unencumbered transfer of title, attributed to them by the court below, that meaning is negatived by the explicit terms of the documents which were intended to control the transfer. WAA Form 65 refers to the transaction as merely a "transfer" under which Vineland would "acquire" aeronautical property (R. 14–16). And, although the Release of Custoday Form (Plaintiff's Exhibit 4) uses the words "purchaser" and "sold," it purports only to release custody of the aircraft to Vineland's representative and carries the added notation that "[t]his aircraft was sold for educational purposes only." And if, as the court below ruled, the parties intended Vineland to receive full title to the plane, it is interesting to speculate why no bill of sale or certificate of title was ever issued to Vineland.

Furthermore, Vineland understood that it had not received full and unencumbered title and was acutely sensitive of the limitations on its power to convey. In the notice for bids which culminated in the sale to the Finns, Vineland stated that the plane was "subject to certain restrictions on the use thereof" (R. 57) and advised that before there could be a sale "the successful bidder will be required to secure the necessary releases to said restrictions from the proper governmental agency of the United States" (R. 58). The same provisions were included in the Contract for Sale to the Finns (R. 62–64). In addition, Vineland, in corresponding with various agencies in regard to surplus aircraft, acknowledged the Government's power to prevent a sale or exchange of the plane on at least one occasion (Plaintiff's Exhibit 18).

The Finns also recognized that the Government retained the right to block the sale of the plane and to insist that it be used in a specific manner; one of them travelled all the way from California to Washington, D. C., and strenuously sought in

numerous conferences with Government officials to obtain a release of those restrictions and governmental consent to the sale. Although the testimony in the record is conflicting, there is evidence that the Finns offered to pay the Government $2,000 or $3,000 for such a release (R. 687, but see R. 456). Likewise, the Government agencies charged with supervision of these transfers to educational institutions consistently advised that the Government retained a property interest and insisted on compliance with the terms of WAA Form 65 (R. 686, 824, 871; Plaintiff's Exhibit 15; Finn's Exhibits K–7, K–8, K–9, K–10).

Thus, when viewed in context, it seems quite clear that the effect of the WAA Form 65 was to retain a proprietary interest in the plane transferred to Vineland for specific limited purposes, the breach of which entitled the Government to recover possession of the plane. And while we believe it unnecessary to the disposition of this case to fit the Government's arrangements with Vineland within a specific category of legal relationships, these arrangements had certain characteristics common to certain well defined legal categories. It is to those that we now turn.

2. *Bailment.* The transaction between the Government and Vineland has all the usual characteristics of a bailment by the United States to Vineland as the bailee for so long as the plane was used for educational purposes. Not only was there authority to bail the plane,[30] but the transaction clearly comes within the classic definition of a bailment, *i. e.*, the delivery of possession of goods for a specified purpose to be redelivered to the bailor or otherwise dealt with according to his directions after that purpose had been fulfilled. Cf. *Firestone Tire and Rubber Co.* v. *Cross,* 17 F. 2d 417, 418 (C. A. 4); *Breeden et ux.* v. *Elliott Bros.,* 173 Tenn. 382, 385, 118 S. W. 2d 219, 220; *Black's Law Dictionary,* p. 184 (3d ed. 1933). Paragraph 7 of the WAA Form 65 provides for a specific method of disposition of the aircraft when the purpose of the bailment has been

[30] Section 13 (a) (1) (A) of the Surplus Property Act of 1944, specifically authorized the "leasing" of surplus property to educational institutions (see *supra*, p. 22). The word "lease" when applied to personal property generally refers to the relationship of bailor and bailee. See 8 C. J. S., *Bailments,* p. 226.

fulfilled, *i. e.*, when, in the language of the Form, the plane becomes "unfit" for the purpose for which it was acquired.

Moreover, it is, of course, the manifested intention of the bailor, not the use of any special formula of language, which causes the creation of a bailment. See *Commissioner* v. *San Carlos Milling Co.*, 63 F. 2d 153, 154 (C. A. 9). Here, that intent can be found in the refusal to give a bill of sale or certificate of title combined with the strict conditions on use and sale which appear in Regulation 4 and WAA Form 65. (See *supra*, pp. 38–39). When, in addition, it is noted that neither the regulation nor the Form used language clearly designed to effectuate a transfer of title and that the Agreement gave Vineland no power of disposition of the aircraft except under the conditions and in the manner specified in paragraph 7, it becomes clear that there existed in the transfer all of the elements ordinarily necessary to create a bailment: the delivery of personal property for a specific purpose and the retention by the bailor of the right to control the disposition of the property after the purpose had been fulfilled.

In the instant case the bailment came to an end when, in October 1951, Vineland ceased to use the plane for educational purposes (R. 267). From that time on the Government had the right to repossess the plane for whatever purpose it desired. Moreover, even before Vineland discontinued its use of the plane, its attempted transfer of title to the Finns—whether effective, as the court below held in its Memorandum Opinion (R. 130), or not (see, *infra*, pp. 67–70)—violated the terms of the bailment, thereby terminating Vineland's interest in the plane and entitling the Government to maintain an action for conversion against Vineland or the Finns. *Coy* v. *E. F. Hutton & Co.*, 44 Cal. App. 2d 386, 112 P. 2d 639; *Knowles* v. *Smith*, 190 Mich. 409, 157 N. W. 276; *Buckmaster* v. *Mower*, 21 Vt. 204. From another point of view, the Government as bailor had the right to terminate the bailment and retake possession of the plane when Vineland permitted the property to be used for flight purposes contrary to the express conditions of the bailment to Vineland. *Trotter* v. *Union Indemnity Co.*, 35 F. 2d 104 (C. A. 9); *Baxter* v. *Woodward*, 191 Mich. 379, 158 N. W. 137; *Carstensen* v. *Gottesburen*, 215

Cal. 258, 9 P. 2d 831; *Burnett* v. *Edward J. Dunnigan, Inc.*, 165 Wash. 164, 4 P. 2d 829; Cal. Civil Code, Sec. 1931.

3. *Trust.* The relationship between the Government and Vineland also fits into that of a trust, with Vineland being the trustee of the plane. The avowed purpose of this disposal program strongly supports such a construction, especially in view of the public policy favoring educational trusts and the consequent judicial rule of construction that instruments should be liberally construed to support such trusts. See Bogert, *Trusts and Trustees,* Vol. 2A, Sec. 361 (1953 ed.). The courts have commonly construed transfers of this nature between governmental units as creating trusts, since the intended purpose was clear and express. Limitations on use or redisposal were not deemed as necessary as they might be in an arm's length transaction between private parties. See, *e. g., United States* v. *Michigan,* 190 U. S. 379; [31] *Wyoming Agricul-*

[31] In *United States* v. *Michigan, supra*, an act of Congress had granted certain public lands to the State of Michigan for the purpose of aiding the State in the construction and operation of a canal. Some of the land so granted was as a right of way for the canal, while other land was expressly made subject to the disposal of the State legislature for the above purposes. Although the statute contained no technical trust language, the Supreme Court held that the State held the land in trust and had the duty to account to the United States for money received from the sale of certain portions of the land:

> Whether, under these circumstances, technical words were used to express the thought that the State was to be a trustee, is not important if, upon a reading of the statutes and a survey of the condition of the country when the acts were passed, it is apparent that the intent was that the State should occupy the position of trustee in the construction and operation of the canal. (190 U. S. 396.)
>
> An examination of the act of Congress of 1852, set forth in the foregoing statement of facts, will show, as we think, the trust character of the transaction between the United States and the State. There is granted to the State, by section one, the right of locating a canal through the public lands of the United States 400 feet in width, but this right of way is by the terms of the act to be used by the State, or under its authority for the construction or convenience of such canal and the appurtenances thereto, and the use thereof is thereby vested in the State forever, but "for the purposes aforesaid and no other." * * * The act does not grant an absolute estate in fee simple in the land covered by this right of way. It was in effect a grant upon condition for a special purpose; that is, in trust for use for the purposes of a canal, and for no other. The State had no power to alien it and none to put it to any other use or purposes. Such a grant creates a trust, at least by implication (190 U. S. at 398).

tural College v. *Irvine,* 206 U. S. 278; *Ervien* v. *United States,* 251 U. S. 41; *Fenn* v. *Kinsey,* 45 Mich. 446, 8 N. W. 64. The restrictive conditions on Vineland's possession and power to sell the plane lend themselves to being treated as instructions to the trustee set forth as part of the transfer. As in the case of a bailment, violation of the terms of the transfer by Vineland as trustee would authorize the Government to retake title and possession of the plane. See *Restatement, Trusts,* Sec. 333, 334; cf. *Hopkins* v. *Grimshaw,* 165 U. S. 342; *Shoemaker* v. *American Security & Trust Co.,* 163 F. 2d 585 (C. A. D. C.). And this could be enforced against the Finns as well, since they had notice of the terms of the transfer to the school and the infirmities of Vineland's title. See *Restatement, Trusts,* Secs. 288, 291.

4. *Determinable fee.* Finally, we believe that the Government's transfer to Vineland may be regarded as a transfer of title subject to reverter to the United States upon breach of the conditions specified in WAA Form 65. This not only would be consistent with the language of sale stressed by the court below (R. 128–129, *supra,* pp. 40–41), but also would give effect to the limited purpose of educational use for which the transfer was made. Under this construction Vineland would have obtained a determinable fee interest in the plane, which, although not common for personal property, has been recognized by the courts on numerous occasions. See, *e. g., Hale* v. *Finch,* 104 U. S. 261; *Boal* v. *Metropolitan Museum of Art,* 298 Fed. 894 (C. A. 2); *National Metropolitan Bank* v. *United States,* 111 F. Supp. 422 (Ct. Cls.). In *Northern Pacific Ry.* v. *Townsend,* 190 U. S. 267, the Supreme Court construed the grant of a railroad right of way as the conveyance of a determinable fee subject to reverter for violation of the conditions of the transfer (190 U. S. at 271):

> * * * But, although there was a present grant it was yet subject to conditions expressly stated in the act, and * * * to those necessarily implied, such as that the road shall be used for the purposes designed. Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the

> contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. * * *

See also *Hale* v. *Finch*, 104 U. S. 261; *Gamble* v. *Gates*, 92 Mich. 510, 52 N. W. 941.

The *Northern Pacific* case provides strong, if not compelling, authority for reading the Government's transfer of the plane to Vineland as constituting a grant of "a limited fee, made on an implied condition of reverter in the event the [grantee] ceased to use or retain the [property] for the purpose for which it was granted." As here, the grant in *Northern Pacific* appeared to be in terms of a transfer of title (see 190 U. S. at 271). However, both in *Northern Pacific* and here, the transfer was for a specific limited purpose; in *Northern Pacific*, the purpose was "the construction of a railroad and telegraph as proposed" (190 U. S. at 268) and here the transfer was for the sole use of a tax-supported educational institution for the purpose of non-flight instructional. Surely, this expressed purpose for the transfer, particularly when coupled with the specific restriction on further disposition, in the language of the *Northern Pacific* case, "negated the existence of the power to voluntarily alienate" the airplane before it became unfit for such educational use or in a manner other than that specified in the Agreement.

Moreover, paralleling the fact that in *Northern Pacific* the substantial consideration for the grant was "the perpetual use of the land for the legitimate purposes of the railroad" (190 U. S. at 271), is the fact here that the substantial consideration for the Government's transfer of the airplane to Vineland was the continued educational use of the plane to

meet the legitimate needs of the recipient educational institution so long as the aircraft was fit for such use. This factor is of particular significance here for, as already discussed, Section 13 (a) (1) (C) of the Surplus Property Act of 1944, *infra*, p. 83, required the War Assets Administration to treat the benefits from educational use of the airplane as part of the payment for it, and it was on this basis that the War Assets Administration charged Vineland only $200 for the airplane when its fair market value at the time was at least $5,000. In view of the virtual identity of the controlling facts, we believe to be fully applicable here the holding in *Northern Pacific* that, despite the absence of an express reservation of a right of reverter in the Government, "[i]n effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted" (190 U. S. at 271).[32]

With such a right of reverter in the Government, it follows from the very nature of the Government's right that upon breaches of the conditions of the determinable fee, such as those committed by Vineland here, title to the plane reverted to the Government and so the Government was entitled to immediate possession thereof. See cases cited in fn. 32, p. 47.

D. Appellees are estopped to deny that the terms of WAA Form 65 are valid or to deny that a breach of the terms entitles the Government to retake the plane

When the Government transferred the plane to Vineland, it was clear that the disposal agency considered the terms of WAA Form 65 to be consistent with the Act and the regulation, and interpreted the Agreement as providing for the reten-

---

[32] It is settled that no particular formula need be used to bring about the retention of a right of reverter in the grantor, and, indeed, that no express retention of a right of reverter is necessary. See, *e. g.*, *Staack* v. *Dettcrding*, 182 Iowa 582, 161 N. W. 44; *School District No. 5* v. *Everett*, 52 Mich. 314, 17 N. W. 926; *Board of Education* v. *Edison*, 18 Ohio St. 221; *Meade* v. *Ballard*, 7 Wall. (74 U. S.) 290; *Leonard* v. *Burr*, 18 N. Y. 96. The *Restatement* suggests that disproportionately low consideration from the grantee and a dedication to use important to the grantor, both present in this case, indicate the retention of a right of reverter. See *Restatement, Property*, sec. 45, com. p.

tion by the Government of a property interest in planes transferred under this program. See *supra,* pp. 6, 9, 32, 42. Assuming, *arguendo,* that the court below was correct in ruling that the Government retained only contractual rights (R. 130), Vineland is nevertheless estopped to deny that the Government retained a property interest. The disposal agency made the transfer on the basis of this understanding, as Vineland well knew (see *supra,* pp. 5–7), so that all the elements of a common law estoppel situation are present. See Pomeroy, *Equity Jurisprudence,* Sec. 805 (4th ed. 1918). Moreover, in view of Vineland's knowledge of the disposal agency's understanding as to the effect of WAA Form 65, it would seem, under well-settled principles, that the understanding became part of the agreement, equally binding and effective upon both parties thereto. *Holbrook* v. *Petrol Corp.,* 111 F. 2d 967 (C. A. 9); *Pacific Portland Cement Co.* v. *Food Mach. & Chem. Corp.,* 178 F. 2d 541 (C. A. 9). Finally, Vineland acquiesced in this administrative interpretation for more than 4 years; we submit that this long period of acquiescence constitutes an acceptance by Vineland of the terms as understood by the administrative agency. Cf. *Fitzpatrick* v. *Flannagan,* 106 U. S. 648; *Miller* v. *Continental Shipbuilding Corp.,* 265 Fed. 158 (C. A. 2); *Monad Engineering Co.* v. *United States,* 53 Ct. Cls. 179; *City of Reading* v. *Rae,* 106 F. 2d 458 (C. A. 3), certiorari denied, 308 U. S. 607. Since the Finns were not bona fide purchasers, their rights are no greater than Vineland's, and they also are barred by Vineland's acceptance of the plane without protest as to the conditions and by Vineland's long period of acquiescence. Cf. *Stacy* v. *Thrasher,* 47 U. S. 44, 59.

Likewise, both Vineland and the Finns are precluded from contending that the provisions of WAA Form 65 are invalid. If, as the district court concluded, Vineland was entitled to more beneficial terms under the statute and the regulations that it was accorded under the contract, it has waived its right to insist on those terms. Cf. *Shutte* v. *Thompson,* 15 Wall. (82 U. S.) 151. In the very field of Government contracts for the acquisition or disposal of property, the courts have repeatedly held contractors bound to the prices set by their contracts even though they could have rejected the contracts and insisted on

a better price under a statute or regulation. *American Smelting & Refining Co.* v. *United States,* 259 U. S. 75; *Matson Navigation Co.* v. *United States,* 284 U. S. 352; *St. Louis Hay & Grain Co.* v. *United States,* 191 U. S. 159; *Parish* v. *United States,* 8 Wall. (75 U. S.) 489, 490; cf. *Gray* v. *Commodity Credit Corp.,* 159 F. 2d 243 (C. A. 9), certiorari denied, 331 U. S. 842; see also, cases cited *supra,* pp. 35–36. Moreover, just as a party may not accept benefits conferred by a statute and at the same time attack the validity of the conditions imposed by the legislature (*e. g., Fahey* v. *Mallonee,* 332 U. S. 245, 255; *United States* v. *City and County of San Francisco,* 310 U. S. 16, 29), defendants should not be permitted to enjoy the benefits of the agency's administrative decision to allot the plane to Vineland and attack the validity of the conditions imposed by the agency. Cf. *Callanan Road Co.* v. *United States,* 345 U. S. 507, 513. In formal terms, the vice of the ruling below is that the claim by Vineland (and derivatively by the Finns) that Vineland acquired title to the plane from the Government is predicated on the very document which the district court found to be invalid, and it is settled that a party may not at the same time "claim both under and against the same deed." See *Gibson* v. *Lyon,* 115 U. S. 439, 447. If, as the court below concluded, the disposal agency was without authority to make transfers under the terms set out in WAA Form 65, the logical result of that decision is that the transfer was void and neither Vineland nor the Finns ever acquired any interest in the plane, a result which defendants obviously would not wish to accept.

From another viewpoint, a ruling that defendants could retain the plane without being held to the conditions of Vineland's contract with the Government would be an usurpation of the administrative discretion of the disposal agency. It cannot be said with any certainty that the agency would have transferred this plane to Vineland absent the protective provisions of WAA Form 65; thus judgment for defendants in this case would require the court to rewrite the contract for the transfer to Vineland as originally understood by both parties, striking the clauses now felt to be distasteful, without regard to whether the administrative agency would have made the transfer in the absence of these provisions as construed by it.

Cf. *Federal Power Commission* v. *Idaho Power Company*, 344 U. S. 17. The impropriety of such a result is emphasized in the instant case, where the disposal agency was given broad discretionary powers to fix the price and the terms of the transfer—as well as to determine whether there would be a transfer at all and if so, to whom.

E. Even if the restrictions are contractual, the Government is entitled to damages against Vineland for breach thereof

In its amended complaint, the Government not only sought a declaration that it was the owner of the plane and was entitled to immediate possession thereof, but also, damages against Vineland for breach of contract based on Vineland's failure to abide by the restrictions imposed by WAA Form 65 (R. 23–25, 28). The court below dismissed the Government's complaint on this cause of action as well, on the ground that the restrictions imposed by WAA Form 65 were invalid and so the contract between the Government and Vineland passed to Vineland full and unencumbered title to the plane (R. 132–135). Consequently, the court did not reach the question whether the restrictions, if valid, were violated so that the United States was entitled to recover damages from Vineland for breach of contract.

We have discussed in considerable detail the error of the court in holding that the restrictions were invalid; in this connection, we have shown that the imposition of the restrictions was authorized, if not required, both by the Surplus Property Act of 1944 and by War Assets Administration Regulation 4. See *supra*, pp. 22–36. It remains accordingly, to show that the restrictions were breached. See also *supra*, p. 43.

There could be little dispute that in the absence of a release of the restrictions by the Federal Security Agency, the only Government agency authorized to release same (R. 151)—and the advisory jury as well as the district court found that there was no such release (R. 116, 151) [33]—an outright sale of the

[33] Although the Finns obtained the CAA registration of title and a ferrying permit, it is clear, under the statute authorizing the CAA power to register titles, that such registration has no significance whatever in a proceeding to adjudicate title. Civil Aeronautics Act of 1938, Section 501 (f), 52 Stat. 1005, as amended, 49 U. S. C. 521 (f). Indeed, the statute provides

plane by Vineland to the Finns would, in the circumstances of this case, violate the terms of WAA Form 65.

That Form, the provisions of which Vineland agreed to by signing it and accepting delivery of the plane thereunder, provided that all property "acquired hereunder is for the sole use of a tax-supported or non-profit institution" for nonflight instruction purposes (Paragraph 2; R. 15). Paragraph 6 of the Form goes on to prohibit flight of aircraft acquired under this program (R. 15), and Paragraph 7 contains the agreement that "all acquired property when unfit for the above purpose (*i. e.* educational nonflight use) will be sold only as scrap and then only after it shall have been rendered completely unfit and useless except for its basic material content" (R. 15–16). Plainly, these provisions of the Agreement would be violated by an outright sale to the Finns, who are not associated with any educational institution and who, as the court below found (R. 151), intended to use the plane for commercial transportation service.

Vineland urged at the trial and continues to urge in this Court, that although it entered into a contract for the sale of the plane to the Finns, the sale was never fully accomplished and even if it were, it was *ultra vires* Vineland. While we believe that Vineland's position has substantial merit (see *infra*, pp. 67–70), the court below disagreed. It held in its Memorandum of Decision that in giving to the Finns a CAA form bill of sale, signed by its superintendent, which declared that the school did "hereby sell, grant, transfer and deliver [to defendants Finns] all of * * * [its] right, title and interest in and to such aircraft" and a "Bill of Sale" on Vineland stationery declaring "We hereby sell * * *," Vineland manifested an intention to pass immediate title to the Finns (R. 130). In addition, it held that the transaction was not invalid under the applicable California statute (R. 131). Should this Court agree with these rulings of the district court to the effect that

---

that it shall not even be admitted as evidence before a court hearing such a proceeding. The record shows that the Finns were familiar with that provision of the Act (R. 483), but even if they had not known of it, they must be held to have notice of a statute of the United States and cannot rely on their ignorance of the very law which permitted the representation they allegedly relied upon. CAA registration establishes nationality alone. 49 U. S. C. 521 (f).

Vineland did transfer title to the Finns for flight purposes, then it follows that Vineland breached the restrictions against such a sale of the plane and viewing the restriction on sale as contractual only, the United States is entitled to damages for the breach.

Should this Court, however, disagree with these rulings and hold instead that despite these bills of sale, Vineland did not manifest an intention to transfer title to the Finns at least until the necessary governmental releases had been obtained, we believe that the restriction against sale of the plane *qua* plane were nevertheless breached; for the effect of Vineland's giving these documents to the Finns was to enable them to represent to third persons that they in fact were the owners of the plane. This established a strong possibility that bona fide dealings with the Finns by such third parties would create rights against the plane which might result in diverting it from the educational purpose for which the Government transferred it to Vineland. Should this Court hold, contrary to the findings of the advisory jury (R. 114–115), that International was in the position of such a bona fide purchaser, entitled to enforce its chattel mortgage and aircraft lien against the plane even though the Finns did not have title thereto,[34] there could be no

---

[34] We do not intend in this brief to engage in a detailed discussion of International's claim that it has rights to the plane even though the Finns lacked title thereto, for we believe that in view of the advisory jury's findings (R. 115), which are supported by more than adequate evidence, International's rights are entirely dependent upon or derivative from those of the Finns. However, brief comment thereon may be in order. International's claim that it had rights to the plane independent of those of the Finns has been predicated on the grounds that (1) International was entitled to the protection given a bona fide purchaser of aircraft by Section 503 (c) of the Civil Aeronautics Act of 1938 and Section 25 of the Surplus Property Act of 1944, (2) the Government is estopped to assert its interest because International relied upon governmental representation that the Finns had title, (3) International held an aircraft lien established under California statutes, and (4) International gained an interest in the plane by accession. The finding of the advisory jury that International had "knowledge or notice" of the Government's claim of title (R. 115) effectively precludes International from contending that it was a bona fide purchaser (*Simons Creek Coal Co.* v. *Doran*, 142 U. S. 417; *Hazelhurst* v. *The Lulu*, 77 U. S. 192, 201–202), that it can claim an estoppel on the basis of reasonable reliance on misrepresentations (2 Pomeroy, *Equity Jurisprudence* (4th Ed. 1918), Section 8; *Standard Oil Co.* v. *United*

doubt that Vineland's action in enabling the Finns to appear to have title to the plane resulted in not only a breach of the restrictions against sale but substantial damages to the United States.

In addition, not only did Vineland breach the restrictions on the sale of the plane, but it also breached the conditions restricting the use to which the plane might be put; *i. e.*, that the plane was to be used for non-flight instructional purposes (Par. 2, R. 15) and that it "will not be used for any actual flight purposes" (Par. 6, R. 15). The undisputed evidence shows that in violation of these restrictions, Vineland permitted the Finns to fly the plane away from the school and to prepare it for even more extensive flight use. While it is true that the Finns had obtained the possession of the plane for these purposes by

---

States, 107 F. 2d 402 (C. A. 9), certiorari denied, 309 U. S. 673), that it was entitled to the statutory lien (cf. *Santa Cruz Rock Pavement Co.* v. *Lyons*, 117 Cal. 212), or that it greatly increased the value of the plane without notice of the true state of title (*Union Naval Stores Co.* v. *United States*, 240 U. S. 284).

If any of these positions were available to International, as a factual matter, we would nevertheless urge that they are inapplicable in this case, as a matter of law. Section 25 of the Surplus Property Act (58 Stat. 765) establishes that a bona fide purchaser can rely on an instrument executed by the disposal agency as being valid under the Act, but does not create any rights superior to the disposal contract. Section 503 (c) of the Civil Aeronautics Act (52 Stat. 1006, 49 U. S. C. 523 (c)) protects a bona fide purchaser from the assertion of a prior conveyance which could have been recorded, but it has no significance here, since the only possible conveyance involved here is the transfer to Vineland (the transfer upon which International must rely), and a sale by the United States of a public aircraft need not be recorded. Civil Aeronautics Act of 1938, Section 503 (a), 52 Stat. 1006, 49 U. S. C. 523 (a); cf. Section 1 (30), 52 Stat. 977, 49 U. S. C. 401 (30). No estoppel can be raised against the United States for the action of CAA officials in representing that the Finns had title, assuming that such representations were made, since CAA officials do not have authority to make such representations. Section 501 (f), 52 Stat. 1005, 49 U. S. C. 521 (f); *City and County of San Francisco* v. *United States*, 223 F. 2d 737 (C. A. 9). The California aircraft lien is invalid *vis a vis* the Government since it is dependent upon possession (Cal. Code Civil Proc. Sec. 1208.61) and cannot, in any event, effect property of the United States which can be disposed of only by Congress. United States Constitution, Article IV, Sec. 3, Cl. 2; *United States* v. *Allegheny County*, 322 U. S. 179; likewise, the Government's title to the plane could not have been lost to the airport by accession, absent congressional authority therefor.

representing to Vineland that they had obtained the releases of restrictions, as required by the Vineland-Finn agreement, this does not excuse Vineland's dereliction of its responsibilities in the matter; Vineland accepted the Finns' representation at face value without making any inquiry from state or federal surplus property agencies, with which Vineland had had extensive correspondence, to determine whether a release of the restrictions had in fact been obtained by the Finns. Ordinary caution would have caused any school to make such inquiry, and Vineland had even greater reason to investigate, since it had been involved in previous difficulties relating to the sale of another plane under this same surplus property disposal program (Plaintiff's Exhibit 13). By this conduct, which, viewed even in its best light, constituted negligent disinterest, Vineland permitted the plane to be flown for noneducational purposes by persons who were not connected with any educational institution. The entire purpose of the transfer to Vineland was violated as soon as Vineland lost custody of the plane and it ceased to serve an educational purpose. Or, in terms of the WAA Form 65, the restrictions imposed by Paragraphs 2 and 6 were breached by the delivery of the plane to the Finns for these flight purposes.

Finally, even if the terms of the contract between Vineland and the Finns had been rigidly followed, and Vineland had not released custody of the plane prematurely, the record indicates that the Vineland-Finn agreement contemplated a transfer in violation of Paragraph 7 of the WAA Form 65. The Vineland-Finn contract provided that "[i]n the event that the Contractors [*i. e.*, the Finns] are unable to secure the aforesaid Government releases within one (1) year from the date of this agreement * * * said Contractors shall, nevertheless, be entitled to delivery of the aforesaid C–46 Aircraft No. 23645 for *salvage purposes only* * * *" (R. 64). Paragraph 7 of WAA Form 65, on the other hand, expressly prohibits transfer of the plane by Vineland at any time unless the plane is first reduced to its basic material content so that it can serve only as *scrap* (R. 15–16). Section 8304.1 *infra*, pp. 89–90, carefully distinguishes between salvage and scrap; according to that section, scrap means "property that has no reasonable prospect

of sale except for its basic material content," whereas "[s]alvage has some value in excess of its basic material content because it may contain serviceable components or may have value to a purchaser who may make major repairs or alterations." At the trial below, this difference was emphasized by the testimony of the personnel from the administrative agency (R. 758–759, 852), other expert witnesses (R. 299), and the Finns themselves (R. 451–453). Since the Vineland-Finn contract contemplated that if the requisite government releases for flight use were not obtained, the plane was to be transferred to the Finns for *salvage,* it seems clear that this further provision of the contract constituted a breach of the restrictions of WAA Form 65 for which the United States was entitled to recover damages.

II

The District Court erred in awarding affirmative judgment against the United States on the Finns' counterclaim

Until this point, we have discussed the District Court's action in dismissing the Government's complaint and have shown that, contrary to the holding below, the Government did have title to the plane and was entitled to immediate possession thereof. In these circumstances this Court should reverse the judgment below not only in so far as it dismisses the Government's complaint but also in so far as it awards the Finns' judgment on their counterclaim against the Government. For the latter action is necessarily predicated on the holding that the Government did not have title to and was not entitled to immediate possession of the plane and, with the collapse of the holding, there is no basis for assessing damages against the Government for obtaining possession of the plane by invoking the California claim and delivery procedure. Moreover, even if the court below were correct in dismissing the Government's complaint, we believe that nevertheless the court below erred in awarding judgment against the United States on the Finns' counterclaim.

A. The District Court did not have jurisdiction to entertain the Finns' counterclaim against the Government

Having found that the Government had no title or right to possession to the plane, the court below ruled that the Finns were entitled to recover on their counterclaim. The judgment specified that the Finns should recover either possession of the plane in the same order and condition as when taken by the Government, ordinary wear and tear excepted (R. 160–161), or, should the Government so elect, the sum of $50,000 (R. 161), the advisory jury's valuation of the plane, as of the date of the commencement of this proceeding (R. 117). In addition, the court ordered that the Finns should recover from the Government for loss of use of the plane "the sum of $12,300[35] plus the sum of $15 per day for each and every day such delivery of possession or alternative payment herein provided is delayed after December 31, 1954" (R. 161). We submit that the United States had not consented to maintenance of such a counterclaim against it and that, as a result, the district court did not have jurisdiction to entertain the claim or to award judgment thereon,[36] for it is axiomatic that the United States cannot be subjected to suit except to the extent that Congress has expressly waived the Government's sovereign immunity and consented to that action; in the absence of such consent, it is settled that there can be no jurisdiction to entertain such proceedings or to order judgment against the United States.

---

[35] The $12,300 sum represents $15 per day for each day between the seizure of the plane by the Marshal (September 18, 1952) and December 31, 1954, excepting the period during which the Finns held the plane by reason of their unauthorized repossession (January 18, 1953, to February 1, 1953).

[36] The court below suggested that its jurisdiction over the counterclaim rested upon the fact that it was a compulsory counterclaim within the meaning of Rule 13 (a) of the Federal Rules of Civil Procedure and therefore ancillary to the principal action. However, the Federal Rules were not intended to expand the district courts' jurisdiction over suits against the United States (see *infra*, pp. 59–60). The courts have consistently held that there is no greater jurisdiction over an unconsented (compulsory) counterclaim than over any other unconsented suit. *E. g., Mitchel* v. *Floyd Pappin and Sons, Inc.*, 122 F. Supp. 755 (D. Mont.); cf. *United States* v. *Wessel, Duval and Co.*, 115 F. Supp. 678 (S. D. N. Y.); 3 Moore's *Federal Practice* (2d ed.), sec. 13.28, pp. 75–76.

1. *The Government's invocation of the California claim and delivery procedure did not constitute consent to the maintenance of the counterclaim.* The format of the award made on the Finns' counterclaim corresponds to the form of judgment which a California state court would make whenever a plaintiff's claim for recovery had been denied after he had gained possession of disputed property by California claim and delivery procedure.[37] At the conclusion of a suit to recover possession of personal property in a California state court, the trier of fact determines who is entitled to possession, and, if that is not the person currently holding the property, the value of the property and damages "which the prevailing party has sustained by reason of the taking or detention of such property (Calif. Code Civil Proc., sec. 627, *infra*, p. 99). Judgment is then entered for the prevailing party quieting his possession if he holds the property. But in the event the other party holds the property, as the Government holds it in the present case, judgment is entered "for the possession or the value thereof, in case such a delivery cannot be had, and damages for the detention" (*id.*, sec. 667). Plainly the court below adopted the California provisions in formulating its judgment here. In so doing, the court below clearly erred, for whatever the applicability of the state provisions in cases not involving the Government, these provisions are completely inapplicable to the United States.

---

[37] Under that procedure (Calif. Code Civil Proc., secs. 509–521, 627, 667, *infra*, pp. 97–100), the plaintiff in an action to recover the possession of personal property may, by executing the proper affidavit (*id.*, sec. 510) and posting the specified undertaking by sureties (*id.*, sec. 512), cause the sheriff to seize the property on his behalf. Defendant can obtain a return of possession by demonstrating the insufficiency of plaintiff's sureties (*id.*, sec. 513) or by giving the sheriff an undertaking by two or more sureties for double the value of the property (*id.*, sec. 514). If the defendant does not reclaim the property within five days after receiving notice of the seizure, the sheriff proceeds to deliver the property to the plaintiff pending an adjudication of the merits of his claim (*id.*, sec. 514); the plaintiff's possession is entitled to the protection of a court order if that should prove necessary (*id.*, sec. 521). It was just such a process that was used by International in its state suit against the Finns and was later employed by the Government at the outset of the present proceedings, pursuant to Rule 64 of the Federal Rules of Civil Procedure which permits the use of state attachment procedure in connection with cases pending in the federal courts.

Certainly, the state statutes themselves cannot be considered to have impaired the rights or defenses of the Federal Government, for that result would be inconsistent with the basic postulates of our Federal system. Nor does the fact that the United States Attorney initiated the use of claim and delivery procedure under Rule 64 of the Federal Rules of Civil Procedure have any bearing on the availability against the Government of the state provided remedy against one who invokes this procedure, since Congress alone has the power to consent to such suits. See *Carr* v. *United States,* 98 U. S. 433, 438. No attorney, indeed no officer of the executive branch, has authority to waive the Government's immunity intentionally or, *a fortiori,* accidentally. See *Stanley* v. *Schwalby,* 162 U. S. 255, 270; *United States* v. *Lee,* 106 U. S. 196, 205; *United States* v. *Shaw,* 309 U. S. 495, 501. While assertion of claims by way of set-off or recoupment in an action brought by the United States have been permitted on the theory that such remedies are merely defensive and necessarily affect the measure of damages which the Government should recover (Act of March 3, 1797, secs. 3, 4, 1 Stat. 514–515, as now formulated, 28 U. S. C. 2406; see *Bull* v. *United States,* 295 U. S. 247; *United States* v. *MacDaniel,* 7 Pet. (10 U. S.) 1), that right of set-off is limited to defensive claims and has not been expanded to permit affirmative *in personam* counterclaims in suits brought by the Government. See *National Bank* v. *Republic of China,* 348 U. S. 356, 358 (fn. 2), 368–369; *United States* v. *Shaw,* 309 U. S. 495, 501–504; *United States* v. *Buchanan,* 8 How. (49 U. S.) 83, 105.[38] The counterclaim asserted by the Finns and the recovery allowed thereon are clearly affirmative and do not come within the rule permitting defensive set-offs.

Similarly, no basis for an affirmative judgment in a counterclaim can be derived from the fact that the California pro-

[38] See also *United States* v. *United States Fidelity and Guaranty Co.,* 309 U. S. 506; *In re Greenstreet,* 209 F. 2d 660 (C. A. 7); *United States* v. *Patterson,* 206 F. 2d 345 (C. A. 5); *United States* v. *Hosteen Tse-Kesi,* 191 F. 2d 518 (C. A. 10); *Bowles* v. *Crew,* 59 F. Supp. 809 (S. D. Cal.); *United States* v. *Lauer,* 45 F. Supp. 670 (E. D. Pa.); *United States* v. *Dugan Bros.,* 36 F. Supp. 109 (E. D. N. Y.).

cedure was invoked under the Federal Rules of Civil Procedure. In considering the relationship between the Federal Rules and governmental immunity, one is immediately faced by the necessary conclusion that neither Rule 64 nor any other provisions in the Federal Rules purport to change the substantive rights of ordinary litigants, let alone the United States. See *United States* v. *Sherwood,* 312 U. S. 584, 591; *Mississippi Pub. Corp.* v. *Murphree,* 326 U. S. 438, 444–445; *Ragan* v. *Merchants Transfer and Whse. Co.,* 337 U. S. 530, 532–533. In addition to the general statement in Rule 82 that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts * * *," Rule 13 (d) specifically provides the "rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or any officer or agency thereof." And in *United States* v. *Sherwood, supra,* the Supreme Court, discussing the impact of the Rules on the Government's immunity to suit as a joint defendant in a contract action, summarized their effect as follows (312 U. S. at 589–591):

> * * * But we think that nothing in the new rules of civil practice so far as they may be applicable in suits brought in district courts under the Tucker Act authorizes the maintenance of any suit against the United States to which it has not otherwise consented. An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction; and the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. 723b, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts.
>
> * * * * *
>
> * * * the matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those

> between the claimant and the Government. The jurisdiction thus limited is unaffected by the Rules of Civil Procedure, which prescribe the methods by which the jurisdiction of the federal courts is to be exercised but do not enlarge the jurisdiction.

Indeed, if any significance can be attached to the details of the claim and delivery procedure used, *vis a vis* the Government's amenability to this counterclaim, it is that the United States has expressly withheld consent to such an action. Unlike a private litigant, the Government was free from the obligation of filing a bond or obtaining sureties as a prerequisite to its use of the claim and delivery procedure, since Congress has determined that "[s]ecurity for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution or prosecution of any proceeding." 28 U. S. C. 2408; cf. *United States* v. *Bryant,* 111 U. S. 499, 504–505; *Black Diamond* v. *Stewart and Sons,* 336 U. S. 386, 394; *Brown* v. *Beckham,* 137 F. 2d 644 (C. A. 6), certiorari denied, 320 U. S. 803; *The William J. Riddle,* 111 F. Supp. 657 (S. D. N. Y.). As the Sixth Circuit pointed out in *Beckham,* one important purpose of the statute giving the Government the right to proceed without bond was the desire to provide uniformity in the Government's rights and remedies, regardless of the chance location of the property. Cf. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *United States* v. *Standard Oil Co.,* 332 U. S. 301. Certainly, that policy militates strongly against the conclusion that the Government has consented to suit in those jurisdictions where state law allows affirmative recovery against a plaintiff who has attached property, while like liability would not be incurred by the Government in the numerous jurisdictions where such is not the case. See, *e. g., Overbury* v. *Platten,* 108 F. 2d 155 (C. A. 2), certiorari denied, 311 U. S. 664; *Brown* v. *Peoples Nat. Bk.,* 39 Wash. 2d 776, 238 P. 2d 1191; *Slaughter* v. *Nolan,* 41 S. D. 134, 169 N. W. 232.

2. *United States* v. *The Thekla, 266 U. S. 328, does not support jurisdiction to enter an affirmative judgment on the Finns' counterclaim.* Apparently recognizing that its jurisdiction to

enter judgment against the United States on the Finns' counterclaim could not be founded on the Government's use of California claim and delivery procedure, the court below proposed two theories upon which the necessary consent to suit might be predicated. The first of these [39] is represented by *United States* v. *The Thekla,* 266 U. S. 328, where the Supreme Court allowed an affirmative recovery by a defendant in a suit for damages from a collision brought by the United States.[40] The basis of that decision was that in an admiralty proceeding, such as was there involved, the Government's libel and the cross-libel are interdependent and a proper division of the damages stemming from the collision between the ships can be made only by disposing of both libels. Thus, the decision did not in fact concern a consent to suit, implied or otherwise, but rather dealt with the definition of a single claim for damages from a maritime collision. Because the Supreme Court spoke of an "implication that justice may be done with regard to the subject matter" (*The Thekla, supra,* at 340), a few courts read the opinion as allowing other affirmative counterclaims against the Government, even though the Court also cited cases supporting the proposition "that generally speaking a claim that would not constitute a cause of action against the sovereign cannot be asserted as a counterclaim" and added that "[w]e do not qualify the foregoing decisions in any way * * *" (*id.* at 339).

The true meaning of *The Thekla* was explained at length in the Supreme Court's unanimous opinion in *United States* v. *Shaw,* 309 U. S. 495, where the Court ruled that a state probate court had no jurisdiction to entertain an affirmative counterclaim against the United States. In reply to the argument that the case was governed by the rule in *The Thekla* on the ground that the Government filed the initial claim and that the proceedings were *in rem,* the Court said (at pp. 502–503):

---

[39] The court below also cited as supporting this rule *The Siren,* 7 Wall. (74 U. S.) 152; 28 U. S. C. 2406; and *United States* v. *Shaw,* 309 U. S. 495. However, these authorities relate to the right to interpose defensive claims by way of set-off or recoupment (discussed *supra,* p. 58, and *infra,* pp. 62–63), and do not in any way support the existence of jurisdiction to enter an affirmative judgment against the United States on a counterclaim.

[40] The second theory is that of a taking under the Fifth Amendment and is discussed, *infra,* pp. 63–66.

* * * Respondent further insists that his position is supported by *The Thekla* and subsequent decisions quoting its language. Emphasis is placed upon the fact that these probate proceedings are in rem or quasi in rem as were the libels in admiralty in *The Thekla.*

It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress. We, of course, intimate no opinion as to the desirability of further changes. That is immaterial. *Against the background of complete immunity we find no Congressional action modifying the immunity rule in favor of cross-actions beyond the amount necessary as a set-off.*

*The Thekl*a turns upon a relationship characteristic of claims for collision in admiralty but entirely absent in claims and cross-claims in settlement of estates. The subject matter of a suit for damages in collision is not the vessel libelled but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability. In equal fault, the entire damage is divided. As a consequence when the United States libels the vessel of another for collision damages and a cross-libel is filed, it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision. That conclusion must be stated in terms of responsibility for damages.

* * * * *

* * * There is little indication in the facts or language of *The Thekla* to indicate an intention to permit generally unlimited cross-claims. * * *

The ruling in the *Shaw* case was emphasized by the Supreme Court's opinion in the companion case of *United States* v. *U. S. Fidelity and Guaranty Co.,* 309 U. S. 506. Its vigor has been maintained by subsequent rulings of the Supreme Court (*e. g., National Bank* v. *Republic of China,* 348 U. S. 356, 358, fn. 2) and of this Court. *E. g., United States* v. *Merchants Transfer*

and Storage Co., 144 F. 2d 324, 327 (C. A. 9).[41] See also *United States* v. *Davidson*, 139 F. 2d. 908, 911 (C. A. 5).

3. *The just compensation provisions of the Fifth Amendment does not support jurisdiction to enter affirmative judgment against the United States on the Finns' counterclaim.* The second theory relied on below to support its jurisdiction to enter an affirmative judgment against the United States on the Finns' counterclaim was that the Government's seizure pursuant to California claim and delivery procedure constituted a "taking" for public use for which the Fifth Amendment requires just compensation (R. 139). The reasoning of the district court was that any physical seizure of property constitutes a "taking" within the meaning of the Fifth Amendment, and that the benefit which the Government derived from holding the plane as security showed that the taking was "for public use" in the sense used in the Amendment (R. 139–40). We submit that both these conclusions are erroneous and that under well-established principles this was not a "taking for public use." But, even if it were such a taking, the district court had no jurisdiction to entertain the claim in the form and for the amount granted.

(a) The ruling that the use of judicial attachment procedure, ancillary to a civil lawsuit, is a Fifth Amendment taking is both novel and extraordinary. We have been unable to find a single case in which any other court has ever reached such a conclusion; indeed, our research indicates that apparently no litigant has ever before advanced such a contention. The facts of this case show that the United States did not exercise its power of eminent domain to seize the plane with the intent to apply it for public use; rather the Government utilized a judicial procedure available to every litigant as a means of sequestering property for security against potentially judgment proof defendants. Indeed, the Finns could have regained possession of the plane by posting the specified undertaking of sureties. Furthermore, the physical seizure was originally made by the

[41] In the *Merchants Transfer & Storage* case, this Court recognized that the holding in *The Thekla* "has been limited to the necessities of proceedings in admiralty, where the court is obliged to determine the cross-libel as well as the original libel to reach its conclusion" (144 F. 2d. at 327).

United States Marshal acting as an officer of the court; the Government, *qua* litigant, received constructive possession of the plane from the court's officer after the Finns had failed to exercise their statutory right to redelivery. In all these respects, the Government's acquisition of the plane differs from the recognized scope of a Fifth Amendment taking.

Moreover, it is well established that there is no constitutional taking when the Government seizes property to which it claims to have superior title. *Tempel* v. *United States,* 248 U. S. 121; *Hill* v. *United States,* 149 U. S. 593; *Langford* v. *United States,* 101 U. S. 341; see *United States* v. *Lynah,* 188 U. S. 445, 465; *Twin Falls Canal Co.* v. *American Falls Res. Dist. No. 2,* 59 F. 2d 19, 24 (C. A. 9). The essence of a taking for public use is an appropriation of property admittedly not owned by the Government in order to meet some public need which is considered superior to the individual's interest. There is no indication here that the Government has any desire to retain this plane should its claim to title be defeated. In all likelihood, the appropriate administrative officials will return the plane if the courts determine that the Finns had a superior interest, but even if they retained the plane, the seizure here was made under claim of title so that the remedy, if any, would be in tort (but see *infra,* p. 66, fn. 43), rather than a claim under the Fifth Amendment.

A further factor demonstrating the absence of a Fifth Amendment taking was the lack of authority to effect such a taking.[42] "In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power." See *United States* v. *North American Transportation and Trading Co.,* 253 U. S. 330, 333; see also to the same effect, *United States* v. *Goltra,* 312 U. S. 203, 208–209; *Mitchell* v. *United States,* 267 U. S. 341, 346; *Hooe* v.

[42] Presumably the taking referred to by the court below was acceptance of the plane by the United States Attorney rather than the original seizure by the Marshal, for if the Marshal's seizure were a constitutional taking the eminent domain power would be exercised every time a private litigant invoked attachment procedure.

United States, 218 U. S. 322, 335–336. There was no Act of Congress authorizing the United States Attorney or anyone else to seize the plane for public use, either by specific reference to that plane or as a part of some broad plan. Without such congressional action, the seizure would have been unauthorized and therefore could not have been a constitutional taking. Cf. *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U. S. 579. On the other hand, the United States Attorney did have power to use the procedure established by the courts for obtaining security pending governmental litigation, pursuant to his authority under 28 U. S. C. 507 (a) (2) to "[p]rosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned."

(b) Even if this were a Fifth Amendment taking, this would go only to the existence of a claim against the Government; it would have no bearing on the jurisdiction of the court below to entertain the claim. That matter would still be governed by the terms of the consent to suit as formulated by Congress. The jurisdiction of the district court to hear claims against the United States for just compensation under the Fifth Amendment derives from and is limited by 28 U. S. C. 1346 (a), commonly known as the Tucker Act. Both the amount claimed in the counterclaim and the amount awarded thereon were far in excess of the $10,000 jurisdictional limit specified in that Act. 28 U. S. C. 1346 (a) (2); cf. *North Dakota-Montana Wheat Growers' Ass'n.* v. *United States,* 66 F. 2d 573 (C. A. 8), certiorari denied, 291 U. S. 672. Moreover, although the Tucker Act established jurisdiction to hear original claims for compensation, it would not have warranted the court below to entertain such a suit as a counterclaim. *United States* v. *Nipissing Mines Co.,* 206 Fed. 431 (C. A. 2); *North Dakota-Montana W. G. Ass'n.* v. *United States,* 66 F. 2d 573 (C. A. 8), certiorari denied, 291 U. S. 672; *Oyster Shell Products Co.* v. *United States,* 197 F. 2d 1022 (C. A. 5), certiorari denied, 344 U. S. 885; see 3 Moore's *Federal Practice* (2d ed.), sec. 13.29; cf. *Nassau Smelting Works* v. *United States,* 266 U. S. 101; *United States* v. *Skinner & Eddy Corp.,* 35 F. 2d 889 (C. A. 9), certiorari dismissed 281 U. S. 770.

And, assuming this were a Fifth Amendment taking, the measure of damages would be the value of the plane when seized plus interest as part of just compensation. See *United States* v. *Klamath Indian Tribe,* 304 U. S. 119, 123; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123; cf. *United States* v. *Alcea Band of Tillamooks,* 341 U. S. 48, 49. The judgment of the court below provided for an alternative return of the plane or a payment of its value plus $15 per day for the period during which the Finns are deprived of the plane or its value. Even if we ignore the obvious irregularity of an alternative judgment in such a case, it is clear that 10.9% ($15 per day on $50,000) would be an unreasonably exorbitant interest rate. Cf. *United States* v. *Rogers,* 255 U. S. 163; *United States* v. *Highsmith,* 255 U. S. 170.[43]

B. The Finns were not entitled to judgment since they had neither title nor a right to possession of the plane at the time the Government sequestered it

It is well established under California law that damages cannot be recovered for the deprivation of property, whether by claim and delivery procedure or otherwise, except by one who had an immediate right to possess that property at the

[43] In support of the measure of damages used, the court below cited various sections of the Federal Tort Claims Act (*i. e.*, 28 U. S. C. 2674, 2680), apparently suggesting that the reference to state law made by that Act can be used in applying other statutes waiving governmental immunity. It is clear, however, that each act consenting to suit against the United States must be considered independently of all others. The district court did not suggest that its jurisdiction was founded upon the Federal Tort Claims Act, nor would such a theory be tenable. Although statutory liability may result from wrongfully obtaining property through claim and delivery procedure, it is not a tort in California, unless it was done with malice and without any probable cause. *Vesper* v. *Crane Co.*, 165 Cal. 36, 130 Pac. 876; cf. *Owens* v. *McManus*, 108 Cal. App. 2d 557, 239 P. 2d 72. That the United States had reasonable ground upon which to institute these proceedings is evident from the decision of the district court in Michigan ruling that the Government was entitled to the plane in almost identical circumstances. *United States* v. *School District No. 2*, 124 F. Supp. 570 (E. D. Michigan). Indeed, even if the seizure had been tortious, the Finns' counterclaim would be barred from proceeding under the Federal Tort Claims Act by the exception stated in 28 U. S. C. 2680 (h), and in any case there is no suggestion in the Federal Tort Claims Act of a waiver of governmental immunity from counterclaims seeking affirmative judgment against the United States.

time it was taken. *Sidney* v. *Wilson,* 67 Cal. App. 282, 227 Pac. 672; cf. *National Funding Corp.* v. *Stump,* 57 Cal. App. 2d 29, 133 P. 2d 855. This same rule is applied in almost every other jurisdiction and is a basic part of the common law. See, *e. g., J. E. McMillan Hdwe. Co.* v. *Ross,* 24 Okl. 696, 104 Pac. 343; *Rahis* v. *McLeod,* 45 Nev. 380, 204 Pac. 501; 54 C. J. S. 612, 614, 626. It is not enough for one who seeks to recover damages to show that the defendant's possessory interest is defective; he must affirmatively demonstrate his own right to immediate possession. We submit that in this case the Finns have failed to make such a showing in that either (1) the Finns never received title or a general right to possession from Vineland, or (2) the Finns lost any title or possessory right they might have had to International. No claim for damages from the Government has been made by Vineland or International, so that we are concerned here only with the Finns' right to recover damages.

1. *The Finns never received title or general right of possession from Vineland.* The contract between Vineland and the Finns provided that "It Is Expressly Agreed and Understood, that this agreement is contingent upon Contractor's ability to secure the necessary clearances from the Government of the United States of America on restrictions now existing on the use and possession of the aforedescribed C–46 aircraft * * *" (R. 62). The Finns were allowed six months to secure the clearances and to perform their other obligations under the contract, with an option to be released from most of their contractual obligations if the clearances could not be obtained (R. 62–63). Failure to obtain the clearances or to perform their other obligations under the contract within six months would not necessarily be fatal to the contract, since the Finns were allowed a right to receive a six months' extension on the deadline for performance. After the expiration of one year, the Finns could obtain the plane for salvage purposes only if they provided satisfactory assurance that they would not violate any governmental restrictions (R. 64).

It is therefore clear that the parties manifested an intention to impose a stringent condition precedent on the sale of the plane to the Finns. The district court made no reference in its opinion to the language of the contract but decided that

Vineland has transferred full title to the Finns (R. 156, 160), apparently relying upon the CAA Form Bill of Sale issued to the Finns by Vineland's superintendent (Plaintiff's Exhibit 5).[44] This Bill of Sale, which was issued pursuant to Paragraph I of the contract between Vineland and the Finns (R. 60), may have been sufficient when combined with possession by the Finns to clothe the Finns with sufficient indicia of ownership to pass good title to a bona fide purchaser. See *supra*, p. 52. It is not sufficient, however, to establish the Finns' title or right to possession in an action where they assert a right to damages for the loss of that property. Paragraph I (R. 60), which called for the issuance of a Bill of Sale, is clearly subsidiary to Paragraph IV (R. 62–64), which established that the obtaining of government clearances and the performance of the other Finn obligations were conditions precedent "not withstanding any other provisions in this agreement * * *." Moreover, the Bill of Sale, itself, indicates on its face that it has no standing superior to the contractual rights of the Finns established by their contract with Vineland, since Vineland carefully inserted on the Bill of Sale the words "as per agreement dated 28, February 1951" (Plaintiff's Exhibit 5). Furthermore, the advisory jury determined that Vineland did not intend to transfer title to the plane "at any time before all necessary consents and releases and waivers of the Government had been procured" (R. 112). The restrictions were never released (R. 116, 151), and most of the other obligations owed by the Finns under their contract have never been performed (R. 473). Thus, viewing the Finns' custody of the plane in its most hospitable light, they held it only because they misrepresented to Vineland that the Government had consented to a transfer, and they were obliged to return it to Vineland until they performed their part of the contract.

---

[44] In its Memorandum of Decision, the court below also referred to a "Bill of Sale which was typed on the letterhead stationery of the School District," dated October 9, 1950, which reads "We hereby sell * * *" (R. 130). The court was there discussing Vineland's Exhibit G; however, that document has no significance in determining whether Vineland sold the plane in suit to the Finns, since it relates to a different plane bearing a different serial number, which was sold to the Finns by Vineland long before the Finns sought to buy the plane involved in this action (Vineland's Exhibit G).

Such an interest is insufficient to support an action for the damages claimed by the Finns.

Indeed even if Vineland had intended to pass title to the Finns, no conveyance was made which conformed with California law governing the required form for the sale of property held by school districts. California Education Code, Sec. 18701, provides:

> The governing board of any school district may sell to the highest bidder *for cash* any personal property belonging to the district not required for school purposes, or which should be disposed of for the purpose of replacement, or because unsatisfactory, or not suitable for school use, after notice given by publication in a newspaper of general circulation published in the county for a period of not less than two weeks, or by posting notice in at least three public places in the district for not less than two weeks.

It should be noted that the sale to the Finns was only partially for cash consideration; $16,000 of the total $21,000 consideration was represented by a replacement airplane and extensive services which the Finns promised to provide. It is well established in California that the sale of property by a school district in a manner different from that which is prescribed by the state statutes is void and unenforceable. See *Miller* v. *McKinnon,* 20 Cal. 2d 83, 124 P. 2d 34; *Los Angeles Dredging Co.* v. *Long Beach,* 210 Cal. 348, 291 Pac. 839; *Reams* v. *Cooley,* 171 Cal. 150, 152 Pac. 293; *Zottman* v. *San Francisco,* 20 Cal. 96. The statutory provisions must be rigorously followed, and no significant deviation is authorized. *Ibid.* This policy is predicated on such considerations as the necessity for uniform selling methods throughout the state and for strict limitations on the power of a school board to sell property which will ensure that the sales are consistent with the interests of the community they represent.

The contract between Vineland and the Finns failed to conform with the governing statute in at least two important aspects. Nowhere in the California Code is there authority for a school board to barter for the disposal of school district property. Ability to exchange one plane for another enables the

school district to exercise discretion in evaluating the property of the school and that of the bidder; no such discretion was given to the school board. Rather, the statute calls for sales for cash, a method under which little or no discretion is left to the trustees of the school who must accept the highest liquidated bid. And, the ability to accept property instead of cash could often lead to the involvement of schools in the numerous complicated problems associated with potentially encumbered real or personal property. The second substantial deviation from the statutory method for disposal of property was the acceptance of services from the Finns as a major portion of the total consideration. Some of the same factors which militate against allowing a school board to barter for property are applicable to a sale for services. Indeed, California has carefully required that the purchase of services must also be for cash and must be made pursuant to the same type of bidding format as is required for the sale of school property. California Education Code, Sec. 18051.

Finally, even if the Notice for Bids (R. 57–58) had followed the applicable provisions of California law, the contract did not conform with the terms of the notice in the manner specifically ordered by California Education Code Section 18701, *supra*. Again, this rule is based upon the need to limit the discretion of the school board so as to prevent dissipation of public funds, and it is rigorously enforced. See *Miller* v. *McKinnon*, 20 Cal. 2d 83, 88, 124 P. 2d 34; 18 A. G. O. (Cal.) 1. Yet, here the Notice indicated that there would be no transfer of the plane until Government clearance had been obtained, while the contract provided for the execution of an immediate bill of sale plus a right by the Finns to make repairs and otherwise alter the plane prior to receipt of those clearances. In addition, the Notice indicated that no sale would be made at any time unless the requisite clearances were obtained, but the contract indicated that the Finns could eventually obtain the plane for salvage use even though clearance was not obtained. These two variances from the Notice are certainly sufficient to have caused other potential bidders not to have filed a bid and therefore defeated the purpose as well as the language of the California statutes.

2. *The Finns lost to International whatever possessory right they might have had.* Assuming, *arguendo,* that Vineland obtained good title to the plane and conveyed that title to the Finns, the Finns lost their title and right to possess the plane to International. On August 31, 1951, the Finns executed a chattel mortgage of the plane (R. 35–39) as security for a $15,000 loan given them by International. Under the terms of that mortgage the entire debt would be due upon default of any payments or for any other reason which would cause the mortgagee to be insecure (R. 37–38). On the same date, the Finns also executed a lease of the plane to International for eighteen months commencing with the completion of repairs by International (International's Exhibit G). And, from the date that the plane was delivered to International until May 25, 1952, International retained possession of the plane pursuant to the lease and a general agreement for repair services (International's Exhibit E); during that period the airport made the specified repairs and was entitled to payment therefore in the amount of $10,200 (R. 152).

On May 25, 1952, the Finns violated the terms of the lease, the agreement, and the mortgage by taking the plane from International by threat of force (R. 476–479). As a result, International brought an action to recover the plane in the Los Angeles Superior Court on May 28, 1952, and employed the California claim and delivery procedure as a part of that action (R. 153). The plane was delivered to International by the county sheriff on June 15, 1952, after the Finns failed to give the specified written undertaking (R. 153), but the Finns immediately regained possession of the plane by force and excluded International from possession thereof (R. 154). International's action to recover the plane, which was combined with a later action to foreclose on the chattel mortgage of the plane, resulted in a judgment for International by the Los Angeles court (International's Exhibit D). That court ordered, *inter alia,* that International "do have and recover from the defendants (*i. e.,* the Finns) the possession of that certain * * * Curtis C–46 aircraft * * *," "that the chattel mortgage dated August 31, 1951, be enforced and foreclosed upon the aircraft covered by said mortgage," and "that defendants and each of them, and all persons claiming

under them or either of them, be foreclosed of any equity or redemption right, claim, title or other interest in said aircraft * * *" (International's Exhibit D).[45] The court below agreed that these documents established International's right to the plane or any proceeds related thereto and therefore ordered that "if plaintiff (*i. e.*, the Government) should elect to deliver to Defendants George C. Finn and Charles C. Finn * * * that certain Curtis C–46A aircraft * * * said aircraft shall be delivered instead to Defendant, International Airports, Inc. * * *" (R. 176), after which International shall deliver it to the Los Angeles County Sheriff for disposition in accordance with the order of the county court (R. 177). Any doubt as to the Finns' right to the plane was eliminated by the order of the court below that "defendants Charles C. Finn and George C. Finn, their agents, employees, representatives, and any and everyone acting for or on behalf of said defendants Charles C. Finn and George C. Finn or either, be and they hereby are enjoined and restrained from moving, flying, or doing anything with or to the aircraft herein above specifically described * * *" (R. 177). We submit that these orders are wholly inconsistent with an award of damages to the Finns for the loss of the plane in question. It is clear that at the time the Government sequestered the plane (September 18, 1952), the Finns had lost any interest that they might have had in the plane and that they certainly had neither the title nor the right to possession which are necessary to maintain an action for damages. Moreover, if International should bring its own action for conversion against the United States, the effect of the decision below is to subject the Government to a possible double liability.

---

[45] The pleadings and decision in the Los Angeles County case are all included in the record: The complaint filed to recover the plane (International's Exhibit N), the associated affidavit for claim and delivery (International's Exhibit O), and the answer thereto filed by the Finns (International's Exhibit P); the complaint for foreclosure of the chattel mortgage (International's Exhibit Q) and the answer thereto (International's Exhibit R); the Findings of Fact and Conclusions of Law of the Los Angeles County Court in both cases (International's Exhibit S) and the Final Judgment of that court (International's Exhibit D).

C. The District Court erred in awarding damages for detention after judgment

Assuming, *arguendo,* that the Finns were entitled to recover the plane or its value and damages for detention, the judgment below was nevertheless erroneous. If, as the court below apparently decided the measure of damages is established by California law, damages for detention cannot run for a period after judgment.[46] See *Drinkhouse* v. *Van Ness,* 202 Cal. 359, 379, 260 Pac. 869, 875; *Los Angeles Furniture Co.* v. *Hansen,* 46 Cal. App. 5, 188 Pac. 292; *Smith* v. *Pilgrim,* 117 Cal. App. 244; *Ruzanoff* v. *Retailers Credit Ass'n,* 97 Cal. App. 682, 686, 276 Pac. 156. The judgment in this case calls for damages accruing continuously until the plane or its monetary equivalent is returned. The award of $15 per day should be limited to the period before judgment was entered, *i. e.,* before February 7, 1955 (R. 162).

[46] The same rule is applied in almost every other jurisdiction that allows damages for detention, and therefore it probably represents the Federal rule as well. It stems from the principle that courts will not predict prospective damages for which there can be a later remedy and have no jurisdiction to assess them, even on a conditional basis, until they have actually accrued. See *C. J. S., Damages,* secs. 29, 31 (b). Some jurisdictions consider that any award of damages for detention is premature unless possession of the property is continued in the face of a judgment that such possession is wrongful. See, *e. g., Goodyear Tire & Rubber Co.* v. *Marbon Corp.,* 32 F. Supp. 279 (D. Del.); *Union Nat'l Bank* v. *Universal-Cyclops Steel Corp.,* 103 F. Supp. 719 (W. D. Penn.); *Hammond* v. *Thompson,* 54 Mont. 609, 173 Pac. 229.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below dismissing the Government's complaint and awarding affirmative judgment against the United States on the Finns' counterclaim should be reversed.

WARREN E. BURGER,
Assistant Attorney General,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant United States Attorney,

MELVIN RICHTER,
RICHARD M. MARKUS,
Attorneys,

Department of Justice.

APPENDIX A

Exhibits in Evidence

The following is a brief description of each of the exhibits accepted in evidence in the District Court, as described in the Government's exhibit 20 for identification:

Plaintiff's Exhibits

1. AGREEMENT dated June 25, 1946, WAA, signed by Vineland Elementary School District, Supt. Peter A. Bancroft (WAA Form 65).

2. RFC Aircraft Appraisal Sheet dated March 23, 1946, Inspected by H. A. Diekmann, Aircraft Supervisor.

4. Release of Custody of Aircraft of WAA, dated July 25, 1946, stamped "Educational Disposal" and Receipt by Vineland School.

5. Certification of Bill of Sale (photostatic copy), dated February 28, 1951, from Vineland School District to Finns.

6. Individual Aircraft Record Card.

7. Certification of Affidavit of Peter A. Bancroft (photostatic copy), dated April 14, 1951; 42–3645, reg. N111H.

9. Minutes of 1942, 1943, 1944, of Vineland Elementary School District.

10. Affidavit of Malcolm Hunter, October 22, 1954.

12. Certification of photostatic copy of Bill of Sale, dated March 28, 1951, from Vineland Elementary School District to Finns, recorded April 11, 1951 as document #545136.

13. Handwritten letter dated June 4, 1952 by Peter A. Bancroft, June 4, 1952; notarized by Special Agent Richard J. Buxton, F. B. I.

14. Letter from Mr. Frank G. Wisner, Deputy to Assistant Secretary for Occupied Areas, Department of Defense, to Mr. Larson, War Assets Administration, dated February 18, 1948.

15. Property Utilization Bulletin No. 6 by Office of Field Services, Subject: Policy and procedure regarding the utilization of aircraft excess to the needs of educational institutions.

17. Original sworn statement of Peter A. Bancroft, dated November 29, 1946.

18. Photostatic copy of copy of letter from Peter A. Bancroft to W. A. Farrell, dated April 30, 1951.

19. Photostatic copy of copy of letter from Peter A. Bancroft to W. A. Farrell, dated November 5, 1951.

Defendant Vineland's Exhibits

A. Notice for Bids, dated January 6, 1951 (Attached to its Answer).

B. Agreement, dated February 28, 1951 (Attached to its Answer).

C. Letter from Finns to Vineland School District, dated December 5, 1950.

D. Purchase Order, dated June 25, 1946, WAA Form 66 Calif. Cert Symbol 4–A–95, signed Peter A. Bancroft.

E. WAA Instructions of Office of Aircraft Disposal, Educational Aircraft Disposal Div., Washington, D. C.

F. 16 mm moving picture sound film.

G. Bill of Sale—Certificate of Title, signed by Peter A. Bancroft, Superintendent, October 9, 1950, Vineland School District.

Defendant International's Exhibits

A. Certification of true copies—(photostatic copies) of:

WAA Sales Receipt, July 10, 1946; Affidavit of Peter A. Bancroft, dated April 14, 1951;

Bill of Sale, February 28, 1951, from Vineland School District to Finns, recorded April 16, 1951. #545613;

Original and duplicate copy of Certificate of Registration N111H, April 16, 1951, in names of Finns;

Duplicate copy of Corrected Certificate of Registration N111H, issued June 18, 1952, in names of Finns;

B. Photostatic copy of Aircraft Chattel Mortgage, dated August 31, 1951, between Finns and International.

C. Photostatic copy of Note Secured by Chattel Mortgage, dated August 31, 1951, signed by Finns to International.

D. Photostatic copy of Judgment, Nos. 599, 895 and 600,291, Superior Court, Los Angeles County; International and Finns.

E. Agreement dated August 31, 1951 between International and Finns; Exhibit A to Answer to Amended Complaint.

F. Cancelled check No. 2237 of International $15,000 to Finns, September 1, 1951.

G. Lease of Aircraft, copy, August 31, 1951, between Finns and International.

H. Supplement to Lease, dated September —, 1951, between Finns and International.

I. Photostatic copy of Supplement to Agreement, dated September —, 1951, between International and Finns.

J. Certified photostatic copy of:

Note Secured by Chattel Mortgage dated August 31, 1951, $15,000, signed by Finns;

Letter dated May 18, 1952 from Finns to International requesting limited custody of A/C #N111H;

Letter dated May 19, 1952 from Finns to International;

Letter dated May 20, 1952 from Finns to International.

K. Letter dated October 15, 1951 to A. J. Blackman from James B. Murray, Aircraft Title and Guaranty Corp., Washington, D. C.

L. "Re: Complete search and report on N111H $10.00" Aircraft Title and Guaranty Corp., to A. J. Blackman.

M. Blank form of application of Civil Aeronautics Administration for certificate of registration.

N. Photostatic copy of Complaint No. 599895, Superior Court, Los Angeles County, International Airports, Inc. v. Finn, et al.

O. Photostatic copy of Affidavit for Claim and Delivery No. 599895, Superior Court, Los Angeles County, International Airports, Inc. v. Finn, et al.

P. Photostatic copy of Answer to Complaint, No. 599895, Superior Court, Los Angeles County, International Airports, Inc. v. Finn, et al.

Q. Photostatic copy of Complaint for Foreclosure of Chattel Mortgage, No. 600291, Superior Court, Los Angeles County, International Airports, Inc. v. Finn, et al.

R. Photostatic copy of Answer and Counterclaim, No. 600291, Superior Court, Los Angeles County, International Airports, Inc. v. Finn, et al.

S. Copy of Findings of Fact and Conclusions of Law, Nos. 599895 and 600291, Superior Court, Los Angeles County, International Airports, Inc. v. Finn, et al.

T. Photostatic copy of Sales Document No. 7691309, War Assets Administration to Vineland School District, March 18, 1948.

U. Certification of photostatic copies of certain aircraft records covering Curtiss-Wright aircraft, Serial No. 30225, Reg. N111E:

1. Agreement, dated June 25, 1946, executed by Vineland Elementary School District;

2. War Assets Administration Sales Document No. 7691309;

3. War Assets Administration Release of Custody of Aircraft, dated March 19, 1948;

4. Affidavit of Peter A. Bancroft, dated April 6, 1951;

5. Bill of Sale, dated March 28, 1951, from Vineland School District to Charles C. Finn and George C. Finn, recorded April 11, 1951, as document No. 545136.

Defendants Finns' Exhibits

B. RFC Agreement (photostatic copy) dated September 18, 1945 (SWPD–DP–35), Grossmont Union High School.

E. Photostatic copy of teletype dated July 10, 1946 from Heddleston, Reg. Dir., to Chief Fiscal Branch.

K. Certification of following photostats:

1. Handwritten statement by M. P. Howard, W–60, Civil Aeronautics Admn., dated April 11, 1951;

2. Affidavit of Peter A. Bancroft, dated April 14, 1951;

3. Letter dated April 16, 1951, from Edwin R. Flatequal, Chief, Reference Service Branch, Fed. Records Center, General Services Admn., to Mrs. Marilyn H. Kelly, Asst. Chief, Records Branch, CAA;

4. Bill of Sale, dated February 28, 1951, from Vineland School District to Finns, recorded April 16, 1951, document 545613;

5. Application for registration in names of Finns.

6. Original and duplicate copy of Certificate of Registration N111H, dated April 16, 1951, in names of Finns;

7. Message 012240Z, dated November 2, 1951, from Sixth Regional Office, CAA to W–300;

8. Copy of Message 021945Z, dated November 2, 1951, from Haldeman, CAA, to CAA, L. A.;

9. Message 051945E, dated November 5, 1951, from Sixth Reg. Office, CAA, to W–295;

10. Copy of Message 061800Z, dated November 6, 1951, from Haldeman, CAA, to CAA, L. A.;

11. Letter, dated November 5, 1951, from International to CAA, Aircraft Records Sec. A–300;

12. Aircraft Chattel Mortgage, dated August 31, 1951, executed by Finns in favor of International, recorded November 14, 1951, document 571852;

13. Copy letter, Form ACA–506, dated November 15, 1951, from Haldeman, Chief Aircraft Div., CAA, to International;

14. Letter dated March 11, 1952, from Seaboard Surety Co. to CAA;

15. Copy of Message 21200Z, dated May 21, 1952, from Robinette, CAA, to CAA, L. A.;

16. Message 282310Z, dated May 29, 1952, from Sixth Reg. Office, CAA.;

17. Copy of letter dated June 11, 1952 from Haldeman, Chief, Aircraft Engr. Div., CAA, to Seaboard Surety Co.;

18. Memo by Margaret E. O'Neill, dated June 17, 1952;

19. Letter, dated June 23, 1952, received May 26, 1952 from George C. Finn, to Margaret O'Neil, Chief, Aircraft Reg., CAA;

20. Duplicate copy Corrected Certificate of Reg. N111H, issued June 18, 1952, in names of Finns;

21. Letter dated June 18, 1952 from George C. Finn to Aircraft Records Branch, CAA;

22. Letter dated September 8, 1953 from W. T. Frazier, Chief, Surplus Property Utilization Div., Dept. of Health, Education, and Welfare, to Dept. of Commerce, CAA.

L. Copy of letter from Finns, dated January 19, 1951, to Board of Trustees Vineland School District.

S. Letter dated May 7, 1952, to Civil Aeronautics Admn., Washington, D. C., from W. T. Frazier, Prop. Utilization Coordinator, Health and Education, requesting photostatic copy of documents submitted to CAA by Finns.

X. Letter dated October 23, 1951 to Finns from Peter A. Bancroft, Vineland School District.

A–X. Bill of Sale, March 28, 1951, and Certificate of Registration N111E, Serial No. 42–96563.

APPENDIX B

Statutes and Regulations Involved

The Surplus Property Act of 1944 (58 Stat. 765) provides in pertinent part as follows:

> Sec. 2. The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderly disposal of surplus property so as—
>
> (a) to assure the most effective use of such property for war purposes and the common defense;
>
> (b) to give maximum aid in the reestablishment of a peace-time economy of free independent private enterprise, the development of the maximum of independent operators in trade, industry, and agriculture, and to stimulate full employment;
>
> * * * * *
>
> (d) to discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise;
>
> (e) to foster and to render more secure family-type farming as the traditional and desirable pattern of American agriculture;
>
> (f) to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business, and professional enterprises;
>
> * * * * *
>
> (h) to assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes;
>
> * * * * *
>
> (j) to avoid dislocations of the domestic economy and of international economic relations;
>
> * * * * *

(m) to achieve the prompt and full utilization of surplus property at fair prices to the consumer through disposal at home and abroad with due regard for the protection of free markets and competitive prices from dislocation resulting from uncontrolled dumping;

* * * * *

(p) to foster the development of new independent enterprise;

(q) to prevent insofar as possible unusual and excessive profits being made out of surplus property;

(r) to dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade, or unduly disturbing the economy, or encouraging hoarding of such property, and to facilitate prompt redistribution of such property to consumers;

(s) to dispose of surplus Government-owned transportation facilities and equipment in such manner as to promote an adequate and economical national transportation system; and

(t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition.

* * * * *

SEC. 4 (58 Stat. 768). Surplus property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such prices, upon such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act.

* * * * *

SEC. 9 (58 Stat. 769). (a) The Board shall prescribe regulations to effectuate the provisions of this Act. In formulating such regulations, the Board shall be guided by the objectives of this Act.

(b) Regulations issued pursuant to subsection (a) may, except as otherwise provided in this Act, contain provisions prescribing the extent to which, the times at which, the areas in which, the agencies by which, the prices at which, and the terms and conditions under

which, surplus property may be disposed of, and the extent to which and the conditions under which surplus property shall be subject to care and handling.

(c) Each Government agency shall carry out regulations of the Board expeditiously and shall issue such further regulations, not inconsistent with the regulations of the Board, as it deems necessary or desirable to carry out the provisions of this Act.

(d) Regulations prescribed under this Act shall be published in the Federal Register.

* * * * *

SEC. 13 (58 Stat. 770–72). (a) The Board shall prescribe regulations for the disposition of surplus property to States and their political subdivisions and instrumentalities, and to tax-supported and nonprofit institutions, and shall determine on the basis of need what transfers shall be made. In formulating such regulations the Board shall be guided by the objectives of this Act and shall give effect to the following policies to the extent feasible and in the public interest:

(1) (A) Surplus property that is appropriate for school, classroom, or other educational use may be sold or leased to the States and their political subdivisions and instrumentalities, and tax-supported educational institutions, and to other non-profit educational institutions which have been held exempt from taxation under section 101 (6) of the Internal Revenue Code.

(B) Surplus medical supplies, equipment, and property suitable for use in the protection of public health, including research, may be sold or leased to the States and their political subdivisions and instrumentalities, and to tax-supported medical institutions, and to hospitals or other similar institutions not operated for profit which have been held exempt from taxation under section 101 (6) of the Internal Revenue Code.

(C) In fixing the sale or lease value of property to be disposed of under subparagraph (A) and subparagraph (B) of this paragraph, the Board shall take into consideration any benefit which has accrued or may ac-

crue to the United States from the use of such property by any such State, political subdivision, instrumentality, or institution.

(2) Surplus property shall be disposed of so as to afford public and governmental institutions, non-profit or tax-supported educational institutions, charitable and eleemosynary institutions, non-profit or tax-supported hospitals and similar institutions, States, their political subdivisions and instrumentalities, and volunteer fire companies, an opportunity to fufill, in the public interest, their legitimate needs.

(b) Under regulations prescribed by the Board, whenever the Government agency authorized to dispose of any property finds that it has no commercial value or that the cost of its care and handling and disposition would exceed the estimated proceeds, the agency may donate such property to any agency or institution supported by the Federal Government or any State or local government, or to any non-profit educational or charitable organization, or, if that is not feasible, shall destroy or otherwise dispose of such property.

* * *

* * * * *

SEC. 15 (58 Stat. 772–73). (a) Notwithstanding the provisions of any other law but subject to the provisions of this Act, whenever any Government agency is authorized to dispose of property under this Act, then the agency may dispose of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions, as the agency deems proper * * *

(b) Any owning agency or disposal agency may execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the Board.

The Federal Property and Administration Services Act of 1949 (63 Stat. 377, as amended, 40 U. S. C. 471 *et seq.*) provides in pertinent part as follows:

* * * * *

SEC. 203. (a) Except as otherwise provided in this section, the Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act.

* * * * *

(c) Any executive agency designated or authorized by the Administrator to dispose of surplus property may do so by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or other interest in property and take such other action as it deems necessary or proper to dispose of such property under the provisions of this title.

* * * * *

(j) (1) Under such regulations as he may prescribe, the Administrator is authorized in his discretion to donate for educational purposes in the States, Territories, and possessions without cost (except for costs of care and handling) such equipment, materials, books, or other supplies under the control of any executive agency as shall have been determined to be surplus property and which shall have been determined under paragraph 2 or paragraph 3 of this subsection to be usable and necessary for educational purposes.

(2) Determination whether such surplus property donated in conformity with paragraph 3 of this subsection is usable and necessary for educational purposes shall be made by the Federal Security Administrator, who shall allocate such property on the basis of needs

and utilization for transfer by the Administrator of General Services to tax-supported school systems, schools, colleges, and universities, and to other nonprofit schools, colleges, and universities which have been held exempt from taxation under section 101 (6) of the Internal Revenue Code, or to State departments of education for distribution to such tax-supported and nonprofit school systems, schools, colleges, and universities; except that in any State where another agency is designated by State law for such purpose such transfer shall be made to said agency for such distribution within the State.

* * * * *

(k) (2) Subject to the disapproval of the Administrator within thirty days after notice to him of any action to be taken under this subsection—

(A) The Federal Security Administrator, through such officers or employees of the Federal Security Agency as he may designate, in the case of property transferred pursuant to the Surplus Property Act of 1944, as amended, and pursuant to this Act, to States, political subdivisions, and instrumentalities thereof, and tax-supported and other nonprofit educational institutions for school, classroom, or other educational use;

(B) the Federal Security Administrator, through such officer or employees of the Federal Security Agency as he may designate, in the case of property transferred pursuant to the Surplus Property Act of 1944, as amended, and pursuant to this Act, to States, political subdivisions and instrumentalities thereof, tax-supported medical institutions, and to hospitals and other similar institutions not operated for profit, for use in the protection of public health (including research);

* * * * *

is authorized and directed—

(i) to determine and enforce compliance with the terms, conditions, reservations, and restrictions contained in any instrument by which such transfer was made;

(ii) to reform, correct, or amend any such instrument by the execution of a corrective, reformative, or amendatory instrument where necessary to correct such instrument or to conform such transfer to the requirements of applicable law; and

(iii) to (I) grant releases from any of the terms, conditions, reservations, and restrictions contained in, and (II) convey, quitclaim, or release to the transferee or other eligible user any right or interest reserved to the United States by, any instrument by which such transfer was made, if he determines that the property so transferred no longer serves the purpose for which it was transferred, and that such release, conveyance, or quitclaim deed will not prevent accomplishment of the purpose for which such property was so transferred: *Provided,* That any such release, conveyance, or quitclaim deed may be granted on, or made subject to, such terms and conditions as he shall deem necessary to protect or advance the interests of the United States.

* * * * *

SEC. 501. All policies, procedures, and directives prescribed—

* * * * *

(b) by any officer of the Government under the Authority of the Surplus Property Act of 1944, as amended, or under other authority with respect to surplus property or foreign excess property;

* * * * *

in effect upon the effective date of this Act and not inconsistent herewith, shall remain in full force and effect unless and until superseded, or except as they may be amended, under the authority of this Act or under other appropriate authority.

Public Law 61, 84th Cong., 1st Sess. (H. R. 3322) provides in pertinent part as follows:

* * * * *

SEC. 2. (a) Subsection (j) of section 203 of the Federal Property and Administrative Services Act of 1949

is amended by adding at the end thereof the following new paragraph:

"(4) The Secretary of Health, Education, and Welfare may impose reasonable terms, conditions, reservations, and restrictions upon the use of any single item of property donated under paragraph (2) of this subsection which has an acquisition cost of $2,500 or more."

(b) The amendment made by subsection (a) shall apply only with respect to property donated after the date of enactment of this Act.

* * * * *

SEC. 4. (a) In the case of personal property donated or sold at a discount for educational, public health or memorial purposes, including research, under any provision of law enacted prior to the enactment of the Federal Property and Administrative Services Act of 1949, no term, condition, reservation, or restriction imposed on the use of such property shall remain in effect after the date of the enactment of this Act. This subsection shall not be deemed to terminate any civil or criminal liability arising out of a violation of such a term, condition, reservation, or restriction which occurred prior to the enactment of this Act, if a judicial proceeding to enforce such liability is pending at the time of, or commenced within one year after the enactment of this Act.

(b) No term, condition, reservation, or restriction imposed upon the use of any single item of property donated under section 203 (j) of the Federal Property and Administrative Services Act of 1949 prior to the enactment of this Act which has an acquisition cost of less than $2,500 shall remain in effect after the expiration of the one-year period which begins on the date of the enactment of this Act. This subsection shall not be deemed to terminate any civil or criminal liability arising out of a violation of such a term, condition, reservation, or restriction if (1) such violation occurred prior to the expiration of such one-year period and (2) a judicial proceeding to enforce such liability is pending

at the time of enactment of this Act or is commenced not later than one year after the expiration of such one-year period.

* * * * *

War Assets Administration Regulation 4 (11 Fed. Reg. 5868) provides in pertinent part as follows:

SEC. 8304.1 *Definitions*—(a) *Terms defined in act.* Terms not defined in paragraph (b) of this section which are defined in the Surplus Property Act of 1944 shall in this part have the meaning given to them in the act.

(b) *Other terms.*

(1) "Aeronautical property" means personal property peculiar to aircraft, and includes but is not limited to aircraft, airframes, all spare parts of airframes, all airborne components, accessories and items of equipment which comprise complete airplanes and their spare parts, aeronautical training and instructional equipment and aids, specialized tools and equipment and tool kits used solely in aircraft maintenance and synthetic flight training devices and their spare parts. Aeronautical property does not include radios not installed in aircraft, nonheated flight clothing, life rafts and life saving devices other than personnel parachutes and such items of oxygen equipment and such navigation instruments and aids as are not normally installed in or attached to an aircraft.

(2) "Commercially unsalable property" as used herein is distinguished from property of no commercial value as used in Part 8319 of this Chapter and means property which has no reasonable prospect of sale at or above a minimum price established by the disposal agency, or where such minimum price has not been established, no reasonable prospect of sale except as salvage or scrap.

(3) "Salvage" means property that is in such a worn, damaged, deteriorated or incomplete condition, or is of such a specialized nature that it has no reasonable prospect of sale as a unit, or is not usable as a unit without major repairs or alteration. Salvage has some value in

excess of its basic material content because it may contain serviceable components or may have value to a purchaser who may make major repairs or alterations. Salvage includes used containers and cable reels.

(4) "Scrap" means property that has no reasonable prospect of sale except for its basic material content.

(5) "Instrumentality" as used herein refers to any instrumentality of a State, territory, or possession of the United States, the District of Columbia, or any political subdivision thereof, as well as such States and subdivisions themselves.

(6) "Nonprofit institutions" means any nonprofit scientific, literary, educational, public-health, public-welfare, charitable or eleemosynary institution, organization, or association, or any nonprofit hospital or similar institution, organization or association which has been held exempt from taxation under section 101 (6) of the Internal Revenue Code, or any nonprofit volunteer fire company or cooperative hospital or similar institution which has been held exempt from taxation under section 101 (8) of the Internal Revenue Code.

(7) "Educational institution or instrumentality" means any school, school system, library, college, university, or other similar institution, organization or association, which is organized for the primary purpose of carrying on instruction or research in the public interest, and which is a nonprofit institution or an instrumentality.

(8) "Public-health institution or instrumentality" means any hospital, board, agency, institution, organization or association, which is organized for the primary purpose of carrying on medical, public-health, or sanitational services in the public interest, or research to extend the knowledge in these fields, and which is a nonprofit institution or an instrumentality.

(9) "Tactical aircraft" means those generally useful only for military purposes and includes aircraft of types designed and useful only for tactical and strategic military missions, as well as such advance trainers and such

basic trainers as are not generally suitable for civilian flying.

(10) "Transport aircraft" means those which are designed to perform or can economically be converted to perform the commercial transportation of persons or property or both. This class includes single and multi-engined land aircraft, seaplanes and amphibians of 5,000 pounds gross weight and over.

* * * * *

SEC. 8304.4 *Interdepartmental Advisory Committee on Surplus Aircraft Disposal.* Pursuant to arrangements made with other interested Government agencies, there is established an Interdepartmental Advisory Committee on Surplus Aircraft Disposal which shall function as an advisory committee to the Administrator and shall consist of representatives of the Department of State, the War Department, the Navy Department, the Department of Commerce, the Office of the Foreign Liquidation Commissioner, the Civil Aeronautics Board, the Reconstruction Finance Corporation, the War Assets Administration, and a representative of the Administrator, who shall serve as Chairman of the Committee. It shall be the duty of such committee to furnish advice and make recommendations to the Administrator with respect to the policies and procedures to be applied in the disposal of surplus aircraft, the allocation of aeronautical property in short supply, and all other matters relating to surplus aeronautical property upon which advice may be requested by the Administrator.

SEC. 8304.5 *Establishing minimum prices.* The disposal agency is authorized to establish minimum prices for items of aeronautical property and to treat as commercially unsalable any such property which after a reasonable test of the market it concludes cannot be sold within a reasonable period of time at prices equal to or greater than such minimum prices.

SEC. 8304.6 *Disposal of tactical aircraft.* (a) Aside from a relatively small demand for tactical aircraft to

serve specialized industrial, educational and private uses, there is no significant market for aeronautical property of this class.

(b) Tactical aircraft which have been determined to be commercially unsalable by the disposal agency shall be disposed of as salvage or scrap as hereinafter provided, or otherwise, and when disposed of other than as salvage or scrap by the disposal agency, such property shall be disposed of at fixed prices. Fixed prices for any such aircraft shall not be less than the sum of the fair market value of its usable components and the scrap value of its residual basic material.

SEC. 8304.7 *Disposal of transport aircraft.* In the disposal of transport aircraft, the disposal agency shall establish, with the approval of the Administrator fixed prices for such aircraft. In fixing such prices, the disposal agency should give consideration to the potential earning power of the aircraft in relation to other models, its estimated economical life in scheduled and non-scheduled commercial service, the degree of modification required for conversion to civilian use and the relationship between supply and demand. If the disposal agency determines that transport aircraft are beyond economical repair or that a fixed price cannot be readily established because of obsolescence, specialized design or other exceptional circumstances, such aircraft may be disposed of by competitive bidding or other method of sale considered appropriate by the disposal agency. The disposal agencies shall attempt, whenever practicable, to dispose of surplus transport type aircraft by sale rather than by lease. Transport aircraft of models approved by the Administrator, may, however, be leased by the disposal agency upon the terms approved by the Administrator; *Provided, however,* That after June 30, 1946, transport aircraft shall be disposed of only by sale.

* * * * *

SEC. 8304.11 *Disposals for educational and public purposes.*

(a) Where the disposal agency determines that any item of surplus aeronautical property is commercially unsalable, disposal may be made to educational or public-health institutions or instrumentalities as provided in this section. The disposal agency shall compile a list of such items and shall ascertain fixed prices which will reflect the benefit which has accrued or may accrue to the United States from the use of such property by educational or public-health institutions or instrumentalities. Such lists shall be submitted to the Administration, and if approved, will be published by order hereunder. The disposal agency is authorized to dispose of such property to educational or public-health institutions or instrumentalities at the prices so approved; *Provided, however,* That no such disposals at the prices so approved may be allowed to any nonprofit institutions which are not exempt from taxation under section 101 (6) of the Internal Revenue Code.

(b) The disposal agency shall establish procedures pursuant to which educational or public-health institutions or instrumentalities may make written application for surplus aeronautical property available for disposal to such institutions or instrumentalities. Such procedures shall include (1) certification that the applicant is an educational or public health institution or instrumentality as defined in Section 8304.1, (2) a certification of the purposes for which the property is to be acquired, and in the case of aircraft an agreement that it will not be flown except for purposes of research or experiment in connection with the science of aeronautics, and (3) an agreement that the property will not be resold to others within three (3) years of the date of purchase without the consent in writing of the disposal agency unless it is mutilated or otherwise rendered unfit for use except as scrap.

Sec. 8304.12 *Nonprofit institutions and instrumentalities.* The price at which nonprofit institutions and instrumentalities, including educational and public-health, shall be entitled to acquire surplus aeronautical

property from the disposal agency if a price list has not been published under the preceding section, shall not be greater than the lowest price at which such property is offered other than scrap to any trade level at the time of acquisition by the nonprofit institution or instrumentality.

SEC. 8304.13 *Donation, destruction, or abandonment.* Donation, destruction or abandonment of surplus aeronautical property shall be governed by the provisions of Part 8319 of this chapter; *Provided, however,* That donations to nonprofit educational or public health institutions or instrumentalities of aeronautical property listed on any order published pursuant to Sec. 8304.11 shall not be made by owning agencies under the act of February 14, 1927 (44 Stat. 1096; 34 U. S. C. 546a) or the act of May 26, 1928 (45 Stat. 753; 20 U. S. C. 94) without the prior approval of the Administrator.

SEC. 8304.14 *Disposal as salvage or scrap.* Pursuant to arrangements reached between Reconstruction Finance Corporation, the War Department, and the Navy Department, the following procedures shall be followed with regard to domestic disposal of surplus aeronautical property as salvage or scrap:

(a) *Disposal of aircraft as salvage or scrap.*

(1) Surplus flyable aircraft which are determined by the disposal agency to be commercially unsalable may be disposed of by owning agencies as salvage or scrap unless other disposition is directed by such disposal agency; or such aircraft may be reported by the owning agency to the disposal agency, and the disposal agency shall dispose of them as salvage or scrap. Non-flyable aircraft determined by the disposal agency to be commercially unsalable shall be disposed of as salvage or scrap by owning agencies unless other disposition is directed by the disposal agency, and such aircraft should not be declared surplus by owning agencies.

(2) The disposal of flyable aircraft as salvage by owning or disposal agencies shall in each case be accompanied by a written representation from the purchaser

thereof that he is acquiring such property as salvage (*i. e.*, for salvaging by disassembly or for non-flight use) and that it will not be resold to another for purposes other than salvage. The disposal of aircraft as scrap by owning or disposal agencies shall in each case be accompanied by a scrap warranty as defined in Part 8309 of this Chapter obtained from the purchaser thereof.

* * * * *

SEC. 8304.54 *Price list for educational and public health institutions or instrumentalities.* The Surplus Property Administrator hereby approves of the list submitted by the War Assets Corporation of items of aeronautical property appearing in Exhibit A and the prices set forth therein which have been ascertained by the War Assets Corporation to reflect the benefits which have accrued or may accrue to the United States by disposal of such items to educational or public health institutions or instrumentalities.

* * * * *

Catalog No.	Type—Symbol Army	Type—Symbol Navy	Manufacturer	Approved name	Number of engines	Approximate size (feet) LHS	Approximate shipping weight (pounds)	Disposal cost (each)
*	*		*	*	*	*		*
42–2420	C–46	R5C	Curtiss-Wright	Commando	2	77 x 22 x 108	26,900	$200
*	*		*	*	*	*		*

California Statutes governing claim and delivery procedure (Cal. Code Civil Proc., secs. 509–21, 627, 667) provide in pertinent part as follows:

Sec. 509. Delivery of personal property, when it may be claimed. The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him as provided in this chapter. [Enacted 1872]

Sec. 510. Affidavit and its requisites. Where a delivery is claimed, an affidavit must be made by the plaintiff, or by someone in his behalf, showing:

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is entitled to the possession thereof;

2. That the property is wrongfully detained by the defendant;

3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;

4. That it has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized, under an execution or an attachment against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure;

5. The actual value of the property. [Enacted 1872]

Sec. 511. [Seizure of property.] The plaintiff or his attorney may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff, or any constable, or marshal of the county where the property claimed may be, to take the same from the defendant. [Enacted 1872; Am. Stats. 1933, p. 1856.]

Sec. 512. [Taking property of defendant: Service of affidavit, etc.] Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, constable, or marshal receiving such affidavit and notice, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the

property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, such officer must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He must, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion, or, if neither have any known place of abode, by putting them in the post office, directed to the defendant. [Enacted 1872; Am. Stats. 1901, p. 135 (unconstitutional); Stats. 1933, p. 1856.]

SEC. 514. [Defendant may retain property by giving undertaking.] At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the officer making the service, a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in section 519. [Enacted 1872; Am. Stats. 1933, p. 1857.]

SEC. 518. [Sheriff, etc., to hold property.] When the sheriff, constable, or marshal has taken property as in this chapter provided, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the same. [Enacted 1872; Am. Stats. 1933, p. 1857.]

SEC. 521. [Protection of plaintiff in possession of property.] After the property has been delivered to the plaintiff as in this chapter provided, the court shall, by appropriate order, protect the plaintiff in possession of said property until the final determination of the action. [Added by Stats. 1913, p. 555.]

SEC. 627. [Verdict in actions for recovery of specific personal property.] In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or, if being in favor of defendant, they also find that he is entitled to a return thereof, must find the value of the property, and, if so instructed, the value of specific portions thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property. [Enacted 1872; Am. Code Amdts. 1873–74, p. 311.]

SEC. 667. [Judgment in replevin for possession or value of property and damages: Judgment payable in specified kind of money or currency: Statement that defendant is subject to arrest.] In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in all actions for the recovery of money, if the plaintiff allege in his

complaint that the same was understood and agreed by the respective parties to be payable in a specified kind of money or currency, and this fact is admitted by the default of the defendant or established by evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff must be made payable in the kind of money or currency so received by such person.

Where the defendant is subject to arrest and imprisonment on the judgment, that fact must be stated in the judgment. [Enacted 1872; Am. Stats. 1933, p. 1882.]

U. S. GOVERNMENT PRINTING OFFICE: 1966